PD-0289-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/17/2020 8:33 PM
Accepted 9/18/2020 9:02 AM
DEANA WILLIAMSON
CLERK

PD-0289-20

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN

FILED
COURT OF CRIMINAL APPEALS
9/18/2020
DEANA WILLIAMSON, CLERK

CHARLES RANSIER, Appellant
v.
THE STATE OF TEXAS, Appellee

14-17-00580-CR
In the Fourteenth Court of Appeals
Houston, Texas

On Appeal From the 207th Judicial District Court
Cause No. CR2016-303
Comal County, Texas

BRIEF FOR THE STATE-APPELLEE ON DISCRETIONARY REVIEW

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Submission on Briefs, Without Oral Argument

Identity of Judge, Parties and Counsel

Judge

The Honorable Jack Robison, 207th Judicial District Court of Comal County

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Table of Contents

Table of Authorities

Statutes

Cases

Statement of the Case

After the Trial Court denied Appellant's request for a lesser-included instruction on Attempted Tampering, Appellant argued to the Jury that it should convict him of the Possession offense but acquit him of Tampering, since it did not have the option of Attempted Tampering (III R.R. at 99-104). The Jury rejected Appellant's argument and convicted Appellant of both Possession and actual Tampering (*id*. at 111-12).

History in the Fourteenth Court of Appeals[1]

On appeal, Appellant raised only two complaints.[2] The second challenged only the alleged error in failing to instruct the jury on the lesser-included offense of 'attempted Tampering' on two of the State's three theories. In a 2-1 decision, the Honorable Fourteenth Court reversed, crafting a new "guilty only" rule and concluding that Appellant had been harmed by the Trial Court's refusal to instruct on lesser-included offenses of attempted Tampering regarding two of the State's three theories.[3] Justice Jewell dissented, noting a jury could not rationally conclude

[1] Though not technically required, this *History in the Fourteenth Court of Appeals* helps detail how the case (including multiple opinions) reached this Court, and it is included in the word count.
[2] Appellant's first complaint challenged the admission of evidence regarding Appellant's status as an "ex-con."
[3] *Ransier v. State*, 594 S.W.3d 1, 8 (Tex. App.—Houston [14th Dist.] 2019, pet. granted), Appendix 'A,' *attached*.

Appellant "failed to alter, destroy or conceal the syringe by all means alleged." Dissent at 5, Appendix 'B,' *attached*; *see also id*. at 6, 6 n.2.

After the State filed a *Motion for Rehearing* discussing Appellant's criminal responsibility (under Tex. Penal Code Sections 7.01, 7.02, and 6.04)[4] for breaking the syringe, the Fourteenth Court's majority issued a Supplemental Opinion in which it stated:

> Nowhere in the majority opinion did we conclude that Kral broke the needle. We recited the facts that Kral grabbed appellant by the shoulder [while appellant was trying to break the needle] and forced him out of the truck, and appellant fell to the ground…. Kral testified that he could not determine whether appellant's falling to the ground after Kral threw him to the ground caused the needle to break off. We concluded a rational jury could have inferred that the syringe was broken by the fall. We stated that any breakage following the struggle was incidental to the struggle and at least arguably involuntary as to appellant.[5]

Stating that "appellant *may not have anticipated* that Kral's attempt to stop him from breaking the syringe would cause the syringe to break," the Court reasoned that "[a] jury could conclude appellant was guilty of attempted tampering if it found appellant had the specific intent to break the syringe [with his thumb] but failed to do so," entitling him to a lesser-included instruction. *Id*. at *3-5, *7 (emphasis added).

[4] *See, e.g*, Motion for Rehearing at 7-12.

[5] *Ransier v. State*, Nos. 14-17-00580-CR, 14-17-00581-CR, 2019 Tex. App. LEXIS 9360, at *3 (Tex. App.—Houston [14th Dist.] Oct. 24, 2019, pet. granted) (designated for publication) (hereinafter "*Ransier II*"), Appendix 'C,' *attached*.

First, the 2-1 *Ransier* majority failed to recognize that principles of causation and criminal responsibility in the Texas Penal Code made Appellant—who made a recorded admission that he intended to break the syringe—guilty of *actual* tampering for breaking the syringe. Appellant could therefore not establish that a rational jury could find him 'guilty only' of *attempted* tampering. Rather than rectify its mistake in its supplemental opinion, the *Ransier II* majority compounded it by trying to graft a 'foreseeability' requirement onto Texas Penal Code § 6.04—despite the fact that this Court already explicitly rejected such a requirement in *Thompson v. State*.[6] The *State's Motion for En Banc Reconsideration* cited both *Thompson* and an 'attempted burglary resulting in accidental arson' case which recognized that:

> [Section 6.04] depicts an effort by the legislature to criminalize an act that resulted in a different offense than the accused intended to commit. Section 6.04(b) transfers the mens rea of a contemplated, but incomplete, offense to the offense actually committed by mistake or accident. The rationale is that public policy demands that persons engaged in criminal activity not be exonerated "merely because they accidentally commit a different offense than originally contemplated."[7]

Motion at 16-19.

Second, the *Ransier* majority inexplicably adopted Appellant's erroneous timeline in evaluating whether Appellant concealed the syringe—essentially

[6] *Thompson v. State*, 236 S.W.3d 787, 793 (Tex. Crim. App. 2007).

[7] This 'attempted burglary resulting in accidental arson' case cited to several other published opinions, including some from this Court and the Fourteenth Court.

beginning *after Appellant had already concealed the syringe*, when the Trooper was first able to recognize it.

Third, the *Ransier* majority's new 'guilty only' rule misinterprets this Court's opinion in *Stadt* and contradicts both the rationale underlying the rule and numerous Courts' application of the rule.

Finally, *Ransier* failed to recognize that sufficiency cases sometimes involve statutory construction, and consequently completely ignored them, in direct contradiction of this Court's analysis in *Bullock*.

Although the State pointed out the foregoing issues to the Fourteenth Court—and said Court asked for a Response to the State's *Motion for En Banc Reconsideration*—it ultimately declined to correct its majority opinions and denied the State's *Motion* on March 3, 2020. After the State's Petition for Discretionary Review was timely filed on May 28, 2020, this Court granted Review on August 19, 2020. The State now timely and respectfully files its Brief in this Honorable Court.

Statement Regarding Oral Argument

This Honorable Court declined to grant oral argument, and the case will be submitted on the parties' briefs.

Questions Presented for Review

1. When—as the *Ransier* Dissent recognizes—the record does not support a rational conclusion that if Appellant was guilty of anything, it was *only* attempted tampering, should the Fourteenth Court have nevertheless reversed Appellant's conviction because of the failure to include a 'lesser-included-offense' instruction to which he was not entitled?[8]

    a. Where multiple provisions on criminal responsibility (Tex. Penal Code § 7.01 and § 7.02) and causation (Tex. Penal Code § 6.04) along with case law from this Court and other courts developing said provisions demonstrate Appellant's criminal responsibility for causing the syringe to break—consequently preventing Appellant from showing he was 'guilty only' of an attempt—should the *Ransier* majority have disregarded the foregoing and crafted new rules regarding causation and criminal responsibility?[9]

    b. Should the *Ransier* Majority have adopted Appellant's timeline of events—essentially, considering only whether Appellant concealed the syringe from the point the Trooper first recognized it, and ignoring Appellant's concealment *prior* to that point?[10]

    c. Should the *Ransier* Majority have misinterpreted this Court's opinion in *Stadt* and crafted its own *new* 'guilty only' rule that is directly contrary to this Court's latter holdings, that of other courts of appeal, and to the rationale underlying the original 'guilty only' rule?[11]

    d. Where this Court in *Bullock* carefully considered sufficiency cases' construction of a statute during *Bullock*'s lesser-included analysis, should the *Ransier* Majority have completely disregarded such cases, instead leaving that question of law to the jury's resolution on a case-by-case basis?[12]

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[8] *See, e.g.*, III R.R. at 38, 46-48; State's Ex. 2 at 1:25; State's Brief ("Brief") at 26-33; *Ransier I*, 594 S.W.3d at 13, 10 n.3; State's Motion for Rehearing ("Rehearing"); *Ransier II*, 2019 Tex. App. LEXIS 9360 at *6-7; State's Motion for En Banc Reconsideration ("Reconsideration").

[9] *See, e.g., supra*; Brief at 17 n.9, 33-34; Rehearing at 5-12; *Ransier II*, 2019 Tex. App. LEXIS 9360 at *6-7; Reconsideration at 6-19.

[10] *See, e.g.*, Brief at 34-40; *Ransier I*, 594 S.W.3d at 4; Rehearing at 13; Reconsideration at 20.

[11] *See, e.g.*, Brief at 29-31; *Ransier I*, 594 S.W.3d at 8-12; Rehearing at 16-24; Reconsideration at 23-31.

[12] *See, e.g.*, *Bullock v. State*, 509 S.W.3d 921, 927-28 (Tex. Crim. App. 2016); *Ransier I*, 594 S.W.3d at 11-12; Rehearing at 25-28; Reconsideration at 32-34.

Statement of Facts

Around 6 p.m. on March 23, 2015, DPS Trooper David Kral was on routine patrol on Interstate 35 (III R.R. at 31, 33). He was making traffic stops for speed enforcement, and would return to the same spot off I35 after each stop (*id*. at 33). At one point, Kral noticed a plastic children's slide sitting on the access road, about 30 feet to the east of a large tree (*id*.). Believing someone had dumped it—and because he had children of his own—Kral thought he might return after work to pick it up (*id*.).

Later on, as Kral was returning from a traffic stop, he noticed a truck in the tree line which had not been there before (*id*. at 34). The plastic slide had been moved from the east side of the tree to the west, right by the driver's side door of the truck (*id*.). Kral decided to investigate (*id*.). After approaching the truck, Kral encountered Charles Ransier, hereinafter Appellant (*id*.).

Appellant's first words were "I defecated myself" or "I shit myself" (II R.R. at 206-07; III R.R. at 132).[1] He said he was going to pay tickets in Seguin (II R.R. at 207; III R.R. at 133). Appellant admitted he had outstanding warrants (III R.R. at

[1] References in *this* paragraph to "II R.R." relate to facts described by the State and Appellant's counsel when discussing Appellant's motion in limine; moreover, references to "III R.R." from page 132 onward are drawn from Kral's testimony at punishment. Although the State argued the facts were same-transaction contextual evidence (II R.R. at 208-09, 214), ultimately most of the facts in *this* paragraph were not introduced at the guilt-innocence stage; the Trial Court simply informed the jury that Trooper Kral had a legal right to investigate without objection (III R.R. at 35).

133). Kral observed a wig over the passenger seat, which initially 'freaked him out' because he thought it was a body (II R.R. at 206; III R.R. at 136). As Kral eased around the truck's doorway, he saw a little girl's swimsuit perfectly laid out on the floorboard (II R.R. at 206; III R.R. at 136). The Trooper observed melted candle wax all over the floor plate and a candle on the dash (II R.R. at 206; III R.R. at 140). At some point, Kral saw that Appellant—who was shirtless—had melted candle wax on his chest (III R.R. at 140). Kral observed a bottle of K-Y jelly on the dash (II R.R. at 206; III R.R. at 140). Other items ultimately recovered from the truck included duct tape, rope, numerous children's toys, children's clothes, 'Extends' male enhancement products, iced-down cucumbers, condoms, baby oil, candy and balloons (II R.R. at 218; III R.R at 143-47).

When Kral asked if he could search Appellant's truck, Appellant was initially reluctant before volunteering to take everything out himself (II R.R. at 208; *see also* III R.R. at 36). Appellant stood by the driver's side of the vehicle, taking items out and telling the Trooper what they were (III R.R. at 37). Appellant was standing between Kral and his truck, with his back to the Trooper (*id*.). *See also* State's Ex. 1 at 0:20. Although Kral was trying to watch Appellant's hands, "at one point, [Kral] couldn't necessarily tell what was in [Appellant's] right hand" (III R.R. at 37). Appellant was "trying to make some kind of movement and basically shoving his right hand underneath the driver's seat" (*id*.).

Kral began repositioning himself—bending over, coming back up, bending over, and leaning to the side—to see what Appellant had in his hand (*id*.). When he asked Appellant what was in his right hand, Appellant did not answer (*id*.). Appellant then said "Nothing...." (State's Ex. 1 at 0:20). Appellant "looked like he was getting more desperate as far as trying to get it under" the seat (III R.R. at 37). At one point when Kral "bent over, [he] noticed what it was in [Appellant's] hand. It was a syringe" (*id*. at 37-38). Appellant was actively trying to break the needle with his thumb and shove the syringe under the seat (*id*. at 38).

Kral told Appellant to back away from the car repeatedly (State's Ex. 1 at 0:20). Eventually Kral grabbed Appellant by the shoulder and arm and "ripped him out of the truck," with Appellant ending up on the ground (III R.R. at 38). Appellant had the syringe in his hand, and Kral saw Appellant throw it to the side, where it landed about two feet away (*id*. at 38-39). Kral later recovered the syringe, though the tip of the needle was broken off (*id*. at 39).

In a later-recorded interview after Appellant was Mirandized, Kral asked Appellant "...were you trying to break it or try to get rid of it?" State's Ex. 2 at 0:15-1:40. Appellant replied:

> That was the intention, yes sir. You had already told me I had to go and then the we came into that other conversation, and – I – look, I'm an ex-con .... I'm not going to tell "hey man this is [garbled] dope in here.

Id. at 1:25. Subsequent testing on liquid recovered from the syringe revealed that it was methamphetamine (III R.R. at 61). Kral testified at trial that Appellant had concealed the syringe from him and altered it by breaking it (*id*. at 39).

After Appellant's request for a lesser-included instruction on 'attempted tampering' was denied, Appellant conceded the possession offense to the jury and argued they should acquit him of tampering, stressing that attempted tampering was not before them (III R.R. at 99-104). The jury convicted Appellant of both tampering and felony possession (*id*. at 111-12).

After hearing additional evidence at punishment—including Appellant's pleas of 'true' to numerous prior convictions, evidence of Appellant's prior manslaughter and aggravated assault convictions in Arizona, his masturbation with vegetables next to a Little League field and his otherwise extensive felony criminal history—the jury assessed punishment at life on the enhanced tampering offense and 20 years on the felony possession offense (III R.R. at 125-31; IV R.R. at 9, 11-13, 17-18, 21, 43; V R.R. at 144, 154).

Summary of the Argument

Appellant did not establish that a rational jury could find him 'guilty only' of *attempted* tampering. As noted *supra*, the 2-1 *Ransier* majority opinions failed to recognize that principles of causation and criminal responsibility made Appellant guilty of *actual* tampering for breaking the syringe.

Despite the fact that this Court has rejected grafting a 'foreseeability' requirement onto Texas Penal Code § 6.04, the *Ransier II* majority tried to do so to salvage its erroneous *Ransier I* majority opinion. Moreover, the *Ransier II* majority overlooked controlling case law which recognizes that:

> [Section 6.04] depicts an effort by the legislature to criminalize an act that resulted in a different offense than the accused intended to commit. Section 6.04(b) transfers the mens rea of a contemplated, but incomplete, offense to the offense actually committed by mistake or accident. The rationale is that public policy demands that persons engaged in criminal activity not be exonerated "merely because they accidentally commit a different offense than originally contemplated."

The *Ransier* majority inexplicably adopted Appellant's erroneous timeline—beginning *after* Appellant had already concealed the syringe—to evaluate whether Appellant concealed the syringe. The *Ransier* majority's new 'guilty only' rule misinterprets this Court's opinion in *Stadt* and contradicts both the rationale underlying the rule and numerous Courts' application of the rule. The majority also erroneously rejected all sufficiency cases as 'inapposite,' despite this Court's careful consideration of 'sufficiency statutory construction' cases in its *Bullock* analysis.

Standard of Review

In evaluating whether the evidence supports a lesser-included instruction under the second *Rousseau* prong, "[a]nything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge." *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). However, although the "threshold showing is low," "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense…." *Id*.

Rather, "there must be some evidence directly germane to a lesser-included offense for the factfinder to consider before an instruction on a lesser-included offense is warranted." *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997). Additionally, "the evidence may not be so weak, contested, or incredible that it could not support such a finding by a rational jury." *Benavides v. State*, 992 S.W.2d 511, 526 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).[2] As the Third Court has noted:

> …the reviewing court considers "all of the evidence admitted at trial" and "not just the evidence presented by the defendant,"[3] and must determine whether there is some evidence from which a rational jury could acquit the defendant of the greater offense and convict the

[2] *See also Brown v. State*, No. 04-12-00813-CR, 2014 Tex. App. LEXIS 8189, at *18 (Tex. App.—San Antonio July 30, 2014, no pet.) (not designated for publication) (Court agreed there was no evidence to support a finding that Brown "did not intentionally and knowingly cause [the victim's] death" in light of substantial evidence from which intent and knowledge could be inferred or demonstrated).

[3] Citing *Goad v. State*, 354 S.W.3d 443, 446 (Tex. Crim. App. 2011); *see also Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993).

> defendant of the lesser offense.[4] In other words, courts must evaluate whether there is some evidence that would allow the jury to rationally determine that if the defendant was guilty, he was only guilty of the lesser offense.[5] "Meeting this threshold requires more than mere speculation—it requires *affirmative evidence* that both raises the lesser-included offense and rebuts or negates an element of the greater offense."[6] …. Moreover, "the evidence produced must be sufficient to establish the lesser-included offense as a 'valid, rational alternative' to the charged offense."[7]

Waldron v. State, No. 03-17-00065-CR, 2018 Tex. App. LEXIS 912, at *36-37 (Tex. App.—Austin Feb. 1, 2018, pet. ref'd) (not designated for publication) (some internal citations omitted) (emphasis added). Finally, in determining whether the evidence supports giving a lesser including instruction, "...the appellate court must examine the entire record instead of plucking certain evidence from the record and examining it in a vacuum." *Enriquez v. State*, 21 S.W.3d 277, 278 (Tex. Crim. App. 2000).

[4] Citing *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012).
[5] Citing *Rice v. State*, 333 S.W.3d 140, 145 (Tex. Crim. App. 2011); *Guzman v. State*, 188 S.W.3d 185, 188–89 (Tex. Crim. App. 2006).
[6] Quoting *Cavazos*, 382 S.W.3d at 385.
[7] Quoting *id*.

I. No Lesser-Included Instruction Was Required Because—on This Record—One or More of the Paragraphs Submitted in the Jury Charge Would Preclude a Rational Jury From Concluding Appellant Was "Guilty *Only*" of *Attempted* Tampering.

a. Appellant 'altered or destroyed' the syringe by breaking it.

1. All affirmative evidence indicated that the syringe's needle was originally attached when Trooper Kral observed Appellant trying to break it with his thumb.

The *Ransier I* majority's speculation based on 'the absence of evidence of the *syringe*'s prior condition' plucked that part of Kral's testimony from the record and examined it in a vacuum. *See* 594 S.W.3d at 9. The majority failed to consider such 'evidence' in the context of the trial—including Trooper Kral's other testimony that Appellant put his thumb on and broke the syringe's *needle*, and Appellant's admissions.

Kral testified that Appellant succeeded in breaking the needle off. The Trooper testified that Appellant "had [the syringe] basically grabbed **like this**[8] and with his thumb he was actively trying to break it and shove it underneath the seat" (III R.R. at 38 (emphasis added)). Cross-examination clarified that Appellant was trying to break—and actually broke—the needle itself:

> Defense: …is that the first time that you noticed the syringe was in his hand when you said ['Hey, what's in your right hand?']?
>
> Kral: Yes.

[8] *See infra* (at 12, n.13).

Defense: Okay. Now, do you have any knowledge of *what the condition of that **syringe***[9] *was prior to it being in his hand at that moment*?

Kral: No, sir.

….

Kral: I can tell you *he was actively trying to break it because that's what happened to the syringe itself*.

Defense: Now, you kept talking about *syringe and you said needle. Were you using those terms interchangeably*?

Kral: *Yes, sir*.

Defense: Okay. So the needle at the point that it ended up on the ground, was it next to the syringe?

Kral: I am not sure.

Defense: Did you ever memorialize the needle itself, taking pictures of it or anything?

Kral: No, sir.

Defense: Where is that needle?

Kral: I have no clue.

Defense: So did it stay at the scene?

Kral: Quite possibly.

Defense: So you are just assuming – okay. *Do you know how that needle connected to the syringe*?

[9] Later, the Defense detailed that by 'syringe,' he meant "the part – the tube that has the liquid in it", and that by 'needle,' he meant what is "attached to the top of the pokey part" (III R.R. at 47).

Kral: Well, there are a few ways that needles can go into syringes. *They can be screwed on or basically the rubber gasket onto the syringe itself.*

Defense: Do you know in this particular case *how that needle connected to that syringe*?

Kral: No, sir.

Defense: So you don't know what the needle – *how the needle was connected to the syringe*[10] prior to you seeing it in his hand. Right?

Kral: No, sir.

Defense: And at the time – and so at some point you say you see him trying to break it. Right?

Kral: Yes, sir.

Defense: And you say that – *you were making a movement with your – the thumb*.[11] Right?

Kral: Yes, sir.

Defense: And was the thumb touching the needle side or touching the plunger side?

Kral: *It was touching the needle side*.

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[10] Notably, the Defense is not asking "whether" the needle was connected to the syringe, but "how" it was connected to the syringe; the Defense was apparently trying to set up its later argument (*infra*) that the needle might have been 'loosely attached,' and was 'inadvertently thrown from the needle' during the struggle and fall to the ground. As Justice Jewell observed, however, the Trial Court admitted the syringe into evidence and the needle was broken; the mere fact that the needle was not recovered was not evidence that Appellant did not break the needle. Dissent at 9 (citing *Hampton v. State*, 109 S.W.3d 437, 441 (Tex. Crim. App. 2003)).

[11] *See infra* (at 12, n.13).

....

Defense: ...Now, do you know whether or not you throwing him to the ground and him having that needle in his hand, *whether it was possible that the act of falling to the ground as a result of you putting him there caused the needle to break off*?

Kral: I couldn't make that determination, no, sir.

Defense: Okay. Within that needle – within the syringe – because I am going to make it easier – we have *the needle that is attached to the top of the pokey part*, then we've got the *syringe which is actually the part – the tube that has the liquid in it*. Right?

Kral: Okay.
….

We were able to salvage a drop [of methamphetamine] out of *the broken end of the needle*.

Defense: The broken end of the – *you mean the syringe*?

Kral: ***No***. Out of the tip. *The tip had broken off*. ***He was successful in breaking that part,*** and so that's where we were able to drop that out of it.

(III R.R. at 44-48 (emphasis added)). Moreover, Appellant admitted in the interview he was "trying to break it or get rid of it." State's Ex. 2 at 1:25.

At trial, even the Defense appeared to acknowledge that there was a needle; it appeared at times to argue based on its cross-examination that the needle might have

been 'loosely attached'—despite Kral's testimony that the tip of the needle had *broken* off—so that it flew off 'inadvertently' when Appellant was flung to the ground:

> Defense: Where was the needle? It wasn't anywhere. He didn't take any pictures of it.
>
> The Court: I don't think he recovered it, did he?
>
> Defense: Well, he doesn't know anything about the needle. He doesn't – ***he says he saw a needle***,[12] but he also says he threw him to the ground and he did not know *whether or not his action –*
>
> The Court: *He said he saw his thumb pushing on it trying to break the needle off*.[13]
>
> ….
>
> And apparently he succeeded in that. Why wouldn't that be altering?
>
> ….
>
> It was recovered without the needle. He obviously … succeeded.
>
> Defense: Judge, [Trooper Kral] threw [Appellant] to the ground. He said that *the act of throwing it to the ground could have caused it to* ***come off***.
>
> ….
>
> Judge, he had no knowledge of what that – the condition of that syringe was prior to first seeing it, none at all.

[12] *See also Sweed*, 351 S.W.3d at 68 ("it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense….").

[13] Given some of Kral's testimony involved gestures, it is significant that both the Trial Court and the Defense took Kral's testimony to mean that Appellant had his thumb on and was trying to break the needle. *See cf. Morales v. State*, 293 S.W.3d 901, 909 (Tex. App.—Texarkana 2009, pet. ref'd) ("Physical demonstrations or gestures have been cited as added reasons appellate courts must defer to jury findings …. The jury is in the better position to evaluate the witnesses. That is especially true when there were physical demonstrations or gestures given in the jury's presence, but that are not explicitly transcribed or detailed in the record.").

> The Court: *He had knowledge there was a needle on it and when he finally recovered it, there wasn't a needle on it*. Sounds like it was altered to me.

(*id*. at 73-74 (emphasis added)).

On appeal, Appellant argued there was never a needle.[14] Brief for Appellant at 22. Appellant did not point to affirmative evidence that there was no needle. *See id*. Instead, he attempted to argue that the fact the needle was not *also* recovered and introduced into evidence—the absence of *additional* evidence—is evidence of absence. *See id*. The fact that Trooper Kral did not recover a "needle in a haystack"—or a large patch of grass, in this case—is not affirmative evidence that there was no needle.

The *Ransier I* majority, for its part, quotes some of Trooper Kral's statements out of context and asserts there was circumstantial evidence Appellant did not break the needle—despite Kral's testimony and demonstration that Appellant placed his thumb on and broke the syringe's needle[15]—because at one point Kral acknowledged

[14] There may be an issue with preservation, in that Appellant's latter emphasis on appeal that there was 'never a needle' may differ from his aforementioned apparent arguments to the Trial Court that the needle was somehow loosely attached and merely 'came off' inadvertently during the struggle. *See Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002) (providing that appellate issue must comport with specific objection made at trial); *see also* PD-0477-19 (Ground One, Review Granted August 21, 2019) (Appellant failed to preserve his request for a lesser-included instruction when he failed to adequately articulate the evidence upon which he was relying), *available at*: http://search.txcourts.gov/Case.aspx?cn=PD-0477-19&coa=coscca .

[15] *See* III R.R. at 38 (Appellant "had it basically grabbed like this and with his thumb he was actively trying to break it and shove it underneath the seat"), 39 (syringe recovered with tip missing and Kral testified Appellant altered it by breaking it), 46-48 (Appellant's thumb "was touching the

he did not know the full condition of the **syringe** *prior to seeing it* in Appellant's hand. *See* 594 S.W.3d at 9; *but see Ritcherson v. State*, 568 S.W.3d 667, 677-78 (Tex. Crim. App. 2018) ("Examining … answers in a vacuum … runs afoul of our holding in *Enriquez* that the *entirety* of a witness's testimony must be considered when applying the second step of the lesser-included offense test.") (emphasis added). Notably, while the Defense elicited that Kral sometimes used the terms 'needle' and 'syringe' interchangeably, the Defense phrased its question regarding the full condition of the "*syringe*" prior to Kral first seeing it, and the Defense later acknowledged that Kral had testified he saw a *needle* attached to the syringe (III R.R. at 44-48, 73-74).

In context, as Justice Jewell's Dissent notes, the evidence demonstrates that Kral merely acknowledged that he had no knowledge of the *syringe*'s full condition *prior to seeing it in Appellant's hand*.[16] There is practically no way Trooper Kral *could* have knowledge of the syringe's exact condition prior to seeing it in Appellant's hand. That Kral did not know what the syringe's full condition was before he recognized it—an absence of evidence—is not *affirmative evidence* that 'the syringe's *needle* was already broken.' *See Cavazos*, 382 S.W.3d at 385 ("…this threshold *requires more than mere speculation—it requires* ***affirmative evidence***

needle side …. the needle …. the tip. The tip had broken off. [Appellant] was successful in breaking that part….").

[16] *See* III R.R. at 44, *supra*.

that both raises the lesser-included offense and rebuts or negates an element of the greater offense.") (emphasis added). As Jewell's Dissent explains, the majority's inferences that Appellant might not have broken the syringe—and particularly, the needle—"are grounded on speculation, not on evidence or reasonable inferences from the evidence[.]" Dissent at 1-11, 5-6, 6 n.2. "Neither [A]ppellant nor any other witness testified that the syringe was broken before Trooper Kral first arrived, and no circumstantial evidence reasonably suggests it was not intact at that time." *Id*. at 8. Moreover, "Appellant simply could not have placed his thumb on the needle as described by Trooper Kral if the needle in fact was not attached." *Id*.

In short, the *Ransier I* majority should have examined Kral's 'no knowledge of the prior condition of the syringe' statement in the context of "the entire record," instead of "plucking [Kral's statement] from the record and examining it in a vacuum."[17] The "entire record" included Appellant's admissions and Kral's affirmative testimony that Appellant placed his thumb on and broke the syringe's needle—indeed, even *the Defense acknowledged Kral's testimony that he had seen the needle attached*.[18] Finally—particularly in light of Kral's testimony that the

[17] *See Enriquez*, 21 S.W.3d at 278; *see also Ritcherson*, 568 S.W.3d at 677-78 ("the *entirety* of a witness's testimony must be considered ….") (emphasis added).

[18] Given that admission, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense…." *See Sweed*, 351 S.W.3d at 68. The Dissent likewise notes that Appellant's cross-examination that Kral 'did not state Appellant broke the needle in his report' was an attempt to convince the jury not to believe Kral, and that "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense." Dissent at 9 (citing *Bullock*, 509 S.W.3d at 925), *id*. (also noting that "If the report said that [A]ppellant did *not* break the needle,

needle was attached and Appellant "was successful in breaking that part" off of the syringe—the *Ransier I* majority's speculation based on the absence of evidence of the *syringe*'s full prior condition is not 'affirmative evidence' that the syringe's *needle* was not attached.[19]

2. Even if Trooper Kral accidentally broke the syringe—while trying to stop Appellant from breaking the syringe—Appellant is criminally responsible.

Principles of causation in the Texas Penal Code precluded Appellant from demonstrating that he was "guilty only" of an *attempt* to break the needle. *Ransier I* and *II* concluded Appellant's struggle with Kral or the fall itself[20] could have broken the needle, and Appellant might not have anticipated such. *See* 2019 Tex. App. LEXIS 9360 at *6-7[21]; *see also Ransier I*, 594 S.W.3d at 9, 9 n.3.

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then I would agree that a scintilla of affirmative evidence is present supporting the lesser-included offense") (emphasis in original); *id*. at 10.

[19] *See Cavazos*, 382 S.W.3d at 385; *see also* Dissent at 1-11, 5-6, 6 n.2.

[20] The Dissent notes that no such evidence was actually elicited; rather, Kral responded to the Defense's questions—suggesting the possibility that the throw or fall broke the syringe—by saying Kral could not determine whether it was possible. Dissent at 9; *id*. ("…attorney questions are not evidence"); *id*. at 10 ("There exists no affirmative evidence from which a jury rationally could find that Trooper Kral's actions, as opposed to [A]ppellant's actions, broke the syringe").

[21] *See also Ransier II*, 2019 Tex. App. LEXIS 9360 at *6-7 (emphasis added):

> Unlike *Miers* or *Dowden*, in which the defendants were or should have been aware that their actions created a substantial risk that someone might be injured or killed, *appellant may not have anticipated that Kral's attempt to stop him from breaking the syringe would cause the syringe to break.*

To the extent *Ransier II* was grafting a foreseeability requirement onto Tex. Penal Code § 7.02(a), such a requirement is mentioned *only* in § 7.02(b). Tex. Penal Code § 7.02. Moreover, even that requirement includes offenses that "should have been anticipated…." Tex. Penal Code § 7.02(b). Where Appellant sought to break the syringe alone—with his *thumb*—he 'should have anticipated'

First, even if Kral broke the needle because he had to struggle with the uncooperative Appellant (who admitted he intended and was trying to break the needle), Appellant is criminally responsible. Appellant acted "with the kind of culpability required for the offense" when he "caus[ed] … an innocent … person to engage in conduct [altering the syringe] prohibited by the definition of the offense." *See* Tex. Penal Code § 7.02(a)(1); *see also McMillan v. State*, 696 S.W.2d 584, 585 (Tex. App.—Dallas 1984, no pet.) (in a 'tampering with a governmental record' case, rejecting appellant's claim that "she did not make a false entry herself" and citing § 7.01 and § 7.02, which allowed culpability based on the actions of an "innocent or nonresponsible person").

The following hypothetical may serve to further illustrate the application of Texas Penal Code § 7.01 and § 7.02: Officer Smith makes a traffic stop of a dangerous criminal with warrants out for his arrest, John Doe. While Doe is standing next to Officer Smith, Doe grabs Smith's sidearm, and a struggle over the gun ensues. During the struggle, Officer Smith's finger ends up on the trigger, and Smith accidentally shoots and kills himself. Upon being apprehended, Doe admits that his intent was to kill Smith and escape. Smith would not have shot himself absent Doe's actions. Doe caused Smith "to engage in an act that, when combined with [Doe's]

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that it could be broken by two men struggling over the syringe. *See also cf. infra* (*Thompson* rejected grafting a 'foreseeability' *mens rea* onto § 6.04).

intent, constitute[d the] offense"[22] of murder, and Doe would be responsible for Smith's murder under the Penal Code—not an 'attempted' murder. *See Miers v. State*, 251 S.W.2d 404 (Tex. Crim. App. 1952) (Where Defendant set in motion the cause which led to the death of deceased, the fact that the deceased accidently shot himself during the scuffle was no defense).

Furthermore, under Texas Penal Code § 6.04(a):

> A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

Tex. Penal Code § 6.04(a).[23]

In *Tam Ha Huynh v. State*, Huynh parked his car sideways on the highway at night, leading to a series of events in which the victim Melton was struck by a third-party vehicle driven by Henk. No. 03-17-00645-CR, 2018 Tex. App. LEXIS 6931, at *1, *2-7 (Tex. App.—Austin Aug. 29, 2018, pet. ref'd) (not designated for publication). Huynh was convicted of Aggravated Assault With a Deadly Weapon

[22] *See Johnson v. State*, 560 S.W.3d 224, 237 (Tex. Crim. App. 2018) (Yeary, J., and Walker, J., concurring) (citing § 7.02(a)(1)); *id.* at 238 (noting said rule was applicable under *Malik*'s 'hypothetically correct' jury charge, despite not being in the actual charge); *Dowden v. State*, 758 S.W.2d 264, 273 (Tex. Crim. App. 1988), and cases cited therein; *Miers v. State*, 251 S.W.2d 404 (Tex. Crim. App. 1952) (Where Defendant set in motion the cause which led to the death of deceased, argument that the deceased accidently shot himself during the scuffle after wrestling gun away from the armed robber was no defense).

[23] "[T]he wording of § 6.04(a) … indicates the concurrent cause is something other than the actor's conduct," *i.e.*, something independent of and not ultimately caused by the actor's conduct. *See Robbins v. State*, 717 S.W.2d 348, 351 n.2 (Tex. Crim. App. 1986), also cited in *Huynh*, *infra*.

based on Melton's injuries. *Id*. at *1. In rejecting Huynh's causation instruction argument, the Third Court initially noted that:

> …it is not entirely clear that the events referred to by Huynh summarized above [including Henk's car allegedly striking the victim] can accurately be described as concurrent causes….
>
> …the actions that Huynh refers to were the direct result of and occurred after his stopping on the highway across two lanes of traffic. In other words, through his actions, Huynh "set into motion a series of events that resulted in" Melton being injured….

Id. at *26-27. The Court further observed that "in any event …. no evidence was presented during the trial suggesting Melton would have been injured in the absence of Huynh's 'contributory conduct.'" *Id*. at *27-28.

> Accordingly, even viewing the evidence in favor of Huynh's requested instruction, "we cannot say that there is any evidence that" Huynh's conduct "was clearly insufficient" and that the conduct of Rodriguez and Henk, "alone, was clearly sufficient to produce the resulting assault." …. On the contrary, the testimony presented at trial supports, at most, "an inference that the actions of" Huynh and the others "caused this occurrence" together.

Id. at *28. The Third Court concluded there was no error in not including the appellant's complained-of § 6.04 instruction. *Id*. at *29.

Similarly, in *Perez v. State*, the appellant claimed the evidence was insufficient to show causation when her SUV was involved in a wreck with a white truck and a motorcycle which killed the motorcyclist, Trisha. No. 07-10-0390-CR, 2012 Tex. App. LEXIS 3218, at *4-7 (Tex. App.—Amarillo Apr. 24, 2012, no pet.) (not designated for publication). According to the appellant, a video from an

officer's patrol car showed her SUV did not strike Trisha; the appellant argued that a third vehicle involved in the collision—a white truck—contacted Trisha, and therefore the State did not prove causation beyond a reasonable doubt. *Id*. at *5.

The evidence showed that the appellant was intoxicated at the time of the wreck, and an officer testified that the appellant was speeding and ran a red light just prior to the wreck. *Id*. at *6. The appellant's SUV struck the motorcycle carrying Trisha with enough force to push it beyond the white truck, and the truck then struck the back right side of the SUV. *Id*. The force of the impact caused Trisha's body to be thrown from the motorcycle, and her shoe may have made contact with the truck. *Id*.

After citing Texas Penal Code § 6.04(a), in rejecting the appellant's causation argument, the court observed:

> This evidence establishes beyond a reasonable doubt that Appellant was intoxicated and that due to her intoxication she set into motion a series of events that directly lead to Trisha's death. *Appellant's intoxication was also the cause of the white pickup even being involved in the collision. But for Appellant's intoxication and running the red light, Trisha's death would not have occurred.*
>
> Additionally, *even if* the white pickup was a concurrent cause of Trisha's death, it alone was insufficient to produce her death. It was not an alternative cause that resulted in Trisha's death independent of Appellant's conduct.

Id. at *7 (emphasis added). Either as a 'but for' or concurrent cause, Perez's intoxication caused Trisha's death. *See id*.; *see also cf. Robbins*, 717 S.W.2d at 351 n.2.

In the instant case, 'but for' Appellant's efforts to break the syringe and struggling with Trooper Kral, the syringe would not have been broken. Even if Kral—or Appellant's falling to the ground—somehow broke the needle, Kral's conduct alone and/or 'the ground' were insufficient by themselves; Kral and the ground were "not… alternative cause[s] that resulted in [the broken needle] *independent* of Appellant's conduct." *See Perez*, 2012 Tex. App. LEXIS 3218 at *7 (emphasis added); *see also Huynh*, 2018 Tex. App. LEXIS 6931 at *26-28.

Because "[i]f the appellant here set in motion the cause which occasioned the [alteration by breaking the syringe,] … he would be as culpable as if he had done the deed with his own hands," Appellant is criminally responsible for causing the syringe to break.[24]

[24] *See cf. Miers*, 251 S.W.2d at 408 (continuing "...We hold here that appellant set in motion the cause which occasioned the death of deceased, and therefore his testimony did not present a defense.").

3. Appellant would be criminally responsible if—during his effort to break the syringe with his thumb and while struggling with Kral—the syringe was 'accidentally' broken in the fall to the ground.

In the hypothetical described *supra*, if while holding the gun, Doe advanced on Officer Smith—intent on shooting the Officer—and Smith, backing away from Doe, fell off a cliff and was killed on impact, Doe would still be guilty of Murder—albeit a different 'offense'[25] than the shooting Doe originally intended. *See supra; see also* Tex. Penal Code § 6.04(a), (b). Doe caused the result "if the only difference between what actually occurred and what he desired, contemplated or risked is that … a different offense was committed." *Id*. § 6.04(b)(1).

The *Ransier II* majority attempted to distinguish the Penal Code principles of causation by grafting a 'foreseeability' requirement onto Texas Penal Code § 6.04:

> Unlike *Miers* or *Dowden*, in which the defendants were or should have been aware that their actions created a substantial risk that someone might be injured or killed, *appellant may not have anticipated that Kral's attempt to stop him from breaking the syringe would cause the syringe to break.*

[25] *See Thompson v. State*, 236 S.W.3d 787, 793, 800 (Tex. Crim. App. 2007) ("'different offenses' [can]… mean different legal theories upon which a conviction could be procured, regardless of how those legal theories might be related to each other …. even a lesser-included offense would be a "different" offense from the offense charged. This latter, more basic, understanding would seem most consistent with the structure of the statute. *It seems a little odd to say that a provision whose purpose is to discount the significance of an offense being 'different' would attribute significance to the fact that the offense is not so different after all*. But a 'same statute' or 'same elements' test would do just that: the perpetrator could [escape responsibility] …on the ground that the two offenses are really the 'same.' …. § 6.04(b)(1) does indeed authorize the transfer of a culpable mental state between offenses contained in the same statute") (emphasis added).

2019 Tex. App. LEXIS 9360 at *6-7 (emphasis added). However, this Court has already rejected such a 'foreseeability requirement' construction of § 6.04:

> As for the State's proposed foreseeability requirement [for Tex. Penal Code § 6.04(b)(1)], the language of the statute does not support such a requirement at all, even by implication. That fact becomes clear when one considers the effect of applying the State's reasoning to "different persons" under the parallel provision codified by subsection (b)(2). The phrase "the only difference . . . is that . . . a different person . . . was injured" plainly does not require the State to prove that injury to a third person was reasonably foreseeable. Substituting the word "offense" for "person" should not yield a different result.

Thompson, 236 S.W.3d at 793.

In the (unrelated) Fifth Court of Appeals case *Thompson v. State*, the defendant entered the Potter Concrete building, intending to burglarize the safe using a cutting torch. No. 05-04-00537-CR, 2005 Tex. App. LEXIS 5817, at *2, *16-17 (Tex. App.—Dallas July 27, 2005, pet. ref'd) (not designated for publication). However, while using the cutting torch, the defendant accidentally ignited the papers in the safe, which ultimately burned down the building. *See id*. After his conviction for arson, on appeal, the defendant challenged both the sufficiency of the evidence to prove arson's "specific intent to damage or destroy a building" and the trial court's instruction to the jury on transferred intent. *Id*. at *13-14.

Citing several published cases,[26] *Thompson* observed that:

[26] In addition to citing cases from the Court of Criminal Appeals, *Thompson* was actually quoting a published case from the Fourteenth Court of Appeals—the transferee Court in this case. *See id*. at *14-15 ("As explained in *Loredo v. State,* 130 S.W.3d 275, 282 (Tex. App. [14th Dist.] 2004, pet. ref'd…."). Although the Fourteenth Court did ask Appellant for a response when the State's

> …although [Texas Penal Code] section 6.04(b) is titled transferred *intent*,
>
> > it is somewhat of a misnomer because the concept does not address intent or any other mens rea. Rather, it depicts an effort by the legislature to criminalize an act that resulted in a different offense than the accused intended to commit. *Section 6.04(b) transfers the mens rea of a contemplated, but incomplete, offense to the offense actually committed by mistake or accident*. *Price v. State*, 861 S.W.2d 913, 916 (Tex. Crim. App. 1993).[27] The rationale is that public policy demands that persons engaged in criminal activity not be exonerated "merely because they accidentally commit a different offense than originally contemplated." *Sargent v. State*, 518 S.W.2d 807, 810 (Tex. Crim. App. 1975). Therefore, the intent to commit the contemplated offense transfers to the offense in fact committed.

Id. at *14-16 (some internal citations omitted) (emphasis added). The Court rejected Thompson's argument that § 6.04's "transferred intent" conflicted with arson's "specific intent …. to damage or destroy a building" requirement, observing that "[t]he pertinent question is whether [the defendant] intended to commit the

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Motion for En Banc Reconsideration cited the following, it ultimately denied the State's motion, and neither the *Ransier I* or *II* majority opinions discussed or distinguished *Thompson* or the Court of Criminal Appeals and Fourteenth Court cases on which *Thompson* relied.

[27] For this proposition, *Thompson* cited to *Price v. State*. *See* 861 S.W.2d 913, 916 (Tex. Crim. App. 1993) (Clinton, J., dissenting) (describing the transferred intent doctrine from the predecessor article 42). The Third Court—the transferor Court for this case—has recognized that "[s]ection 6.04 of the 1974 Penal Code retained the transferred intent of former article 42 from which it was derived." *Rodriguez v. State*, 953 S.W.2d 342, 350 n.15 (Tex. App.—Austin 1997, pet. ref'd) (citing Clinton's dissent in *Price*, among other cases); *see also cf. Thompson v. State*, 183 S.W.3d 787, 792 (Tex. App.—Austin 2005) ("…the only difference between what actually occurred and what appellant desired is that a different offense, or a different grade of the same offense, was committed…. Under section 6.04(b)(1), appellant's intent to cause bodily injury to L.G. 'transferred' to the serious bodily injury that actually resulted from appellant's conduct. .... *As a matter of law*, appellant was shown to have intended serious bodily injury.") (emphasis added), *affirmed by Thompson v. State*, 236 S.W.3d 787.

'contemplated offense,' burglary, but committed a different offense by mistake or accident, arson…." *Id*. at *16-17.

Like the appellant in *Thompson*, *Ransier II* erroneously stressed the 'contemplated, but incomplete' nature of Appellant's intended tampering, stating "….. A jury could conclude appellant was guilty of attempted tampering if it found appellant had the specific intent to break the syringe [with his thumb] but failed to do so." 2019 Tex. App. LEXIS 9360 at *7. However, Thompson similarly had the specific intent to burglarize the safe, but apparently failed to do so—nevertheless, Thompson was criminally responsible for his actual 'accidental' offense of arson under § 6.04(b). Similar to Thompson's rejected argument, *Ransier II* also erroneously tried to dismiss § 6.04 by asserting that "[t]ampering with evidence requires specific intent" for the offense actually or accidentally committed. 2019 Tex. App. LEXIS 9360 at *3.

In the instant case, Appellant—by his own admission—sought to tamper with the evidence by breaking the syringe with his thumb; even *if* he did not succeed in breaking it with his thumb, and it was instead broken by 'mistake or accident' while struggling with Kral, there is even less of an issue transferring Appellant's intent from 'intended-tampering-to-accidental-tampering' than in *Thompson*'s 'intended-burglary-to-accidental-arson' case. Because "[s]ection 6.04(b) transfers the mens rea of a contemplated, but incomplete, offense to the offense actually committed by

mistake or accident," Appellant was guilty of actual tampering. Though it was reasonably foreseeable, the State was not required to show 'Appellant anticipated the syringe would accidentally break while struggling with Kral,'[28] just as it was not required to show 'Thompson anticipated his burglary of the safe would accidentally burn the building down.' *See supra*.

Causation Conclusion

In short, even if Appellant 'accidentally' broke the syringe—on the ground, etc.—when he was trying to break it with his thumb, he is criminally responsible. If Trooper Kral accidentally broke it while trying to stop Appellant from breaking it, Appellant is criminally responsible. Even if Kral or 'the ground' could be said to be concurrent causes, Appellant "set into motion a series of events" that caused the needle to break, and he would be criminally responsible for actual tampering under Tex. Penal Code § 6.04(a).

Because Appellant indisputably intended to break the syringe 'with his thumb' and the requisite mens rea, and—one way or another—actually caused the syringe to break, he is criminally responsible for *actual* Tampering; the Legislature, the law, and "public policy demands that persons engaged in criminal activity not be

[28] Where Appellant plainly believed he could break the fragile syringe alone—with just his *thumb*—it was necessarily 'reasonably foreseeable' that the syringe could be broken by two men struggling over the syringe.

exonerated 'merely because they accidentally commit a different offense than originally contemplated.'" *See Thompson*, 2005 Tex. App. LEXIS 5817 at *14-16.[29] Accordingly, the record would not allow a rational jury to conclude Appellant was 'guilty only' of *attempted* tampering, and the Fourteenth Court should have affirmed Appellant's conviction. *See also infra* (at 35[30]).

b. Appellant concealed the syringe *before* the Trooper noticed what Appellant was concealing in his hand.

In addition having to point to evidence that would allow a rational jury to conclude that he was "guilty only" of an attempt to break the syringe, to be entitled to a lesser-included instruction in this case, Appellant would also have to point to evidence that he was "guilty only" of an attempt to conceal the syringe. On this record—if *Ransier I* had used the appropriate starting point for Appellant's

[29] Such causation principles have been recognized for well over a century, as they were in *People v. Chapman*. 28 N.W. 896, 898-99 (S.C. Mich. 1886):

> Bishop lays down the rule, in his view, thus:
>
> > "Every man is responsible criminally for what of wrong flows directly from his corrupt intentions; but no man intending wrong is responsible for an independent act of wrong committed by another. If one person sets in motion the physical power of another person, the former is criminally guilty for its results. *If he contemplated the result, he is answerable, though it is produced in a manner he did not contemplate*."

(emphasis added) (quoting 1 Bish. Crim. Law (7th ed.), §§ 636, 641) (followed by *People v. Robinson*, 715 N.W.2d 44, 50 (S.C. Mich. 2006)).

[30] Section II observes that "The State 'is entitled to receive a response from the jury on whether the defendant is guilty of the charged offense[s],' and 'to be entitled to lesser-included [instructions, a] defendant must point to evidence that negates every alternate theory of liability for the greater offense.'

concealment—Appellant could not point to such evidence. However, *Ransier I* adopted Appellant's erroneous timeline of events, essentially asserting that there was no concealment if the timeline began when Kral first noticed and recognized what was in Appellant's hand—*after* Appellant had already concealed the syringe from Kral. *See* 594 S.W.3d at 10.

As noted *supra*, Appellant offered to remove items from his truck for Kral:

State: Did you eventually ask [Appellant] if he minded if you searched his vehicle?

Kral: Yes, sir.

State: And did you ask a couple of times? Did he answer you directly?

Kral: No, sir.

State: Did he eventually agree that he would remove the items from his truck for you?

Kral: Yes, sir.

State: And did you agree to let him do that?

Kral: Yes, sir.

State: Now, when you allowed him to do that, where were you standing at?

…..

…Once he started removing the items, tell us where he was and where you were, what side of the truck, that sort of thing.

(III R.R. at 35-36). Appellant initially stood between Kral and his truck—with Appellant's back to the Trooper—while removing items from the vehicle (III R.R. at 37; *see also* State's Ex. 1 at :20). Appellant apparently did so to shield the syringe from Kral's view (*see id*.; *see also supra, infra*). Although Kral was trying to watch Appellant's hands, "at one point, [Kral] couldn't necessarily tell what was in [Appellant's] right hand" (III R.R. at 37).

At that point, Kral testified Appellant was:

> …trying to make some kind of movement and *basically shoving his right hand underneath the driver's seat*.
>
> So whenever he started doing that, *I started rearranging my body, bending over, coming back up, bending over, going to the side*. And I said – I asked him, "What's in your right hand specifically?["] He didn't answer me. He just kept – it almost looked like he was getting more desperate as far as trying to get it under there. And at one point – *at some point whenever I bent over, I noticed what it was in his hand*. It was a syringe.

(*id*. at 37-38 (emphasis added); *id*. at 39 ([State]: "…did the defendant conceal that syringe from you?" [Kral]: "Yes, sir.").[31]

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[31] *See also* III R.R. at 44 (emphasis added):

> Defense: When you told [Appellant], ["]What's in your right hand,["] okay, that was the first time audibly you could hear something.
>
> *Did you notice something before you said that*? I mean, in other words, was that the first moment that you noticed that there was something in his hand when you said, ["]Hey, what's in your right hand?["]
>
> Kral: No, because he had had other things in his hand prior to that whenever he was moving things around. [continued on next page]

Kral's in-car video further demonstrated that Appellant prevented Kral from initially noticing what Appellant was concealing:

> Kral: "Hey, *what's in your right hand*?"
>
> Appellant: [muffled]
>
> Kral: "Huh?"
>
> Appellant: "*Nothing, man*.[32]"
>
> Kral: "Hey, get back over here. Get back over here. Get back – away from the car. Back away from the car."
>
> [sounds of scuffling]
>
> Appellant: "Hey, man!"

State's Ex. 1 at 0:20 (emphasis added); *see also id*. at 2:40 (Kral: "...So, you've got a needle right there..." Appellant: "Where?" Kral: "You know where." Appellant: [muffled] Kral: "We're not, we're not doing this just for the fun of it...." Appellant: "Sorry pal, I'd [muffled] a 'stuffed it ....").

Finally, when the State asked Kral about viewing the video of the event, it elicited the following:

> State: Can you actually see yourself leaning over a couple of times trying to see what he is doing?
>
> Defense: But I'm asking you *is that the first time that you noticed the syringe in his hand* when you said that?
>
> Kral: Yes.

[32] The fact that Appellant responded "nothing" when Kral asked what was in Appellant's hand is further evidence that Appellant was intentionally concealing it from Kral prior to the point Kral finally noticed and recognized what it was. Some of Appellant's statements—including the second word in Appellant's response here—are somewhat muffled, but this word sounds like "man."

Kral: Yes, sir.

State: And at that point, could you tell he had something in his hand he was trying – concealing from you?

Kral: Without a doubt.

State: And eventually you said you were able to lean over and caught a glimpse that it was a syringe?

Kral: Yes, sir.

State: *But up until that point, did he conceal that syringe from you*?

Kral: *Yes, sir*.

(III R.R. at 50-51 (emphasis added)).

The State filed a letter of an additional authority in the Fourteenth Court citing the factually similar case *Rodriguez v. State*. *See* No. 13-15-00287-CR, 2016 Tex. App. LEXIS 6871, at *13-14 (Tex. App.—Corpus Christi June 30, 2016, no pet.) (not designated for publication) (finding evidence—that when officer asked what was in defendant's hands, defendant turned and tried to keep his hands from view, "switched" item from right to left hand, tried to put item in back pocket, and refused to open hand and let go of item until officer struck defendant's fist with a flashlight—sufficient to establish 'concealment' under tampering statute).

The *Ransier* opinions did not mention *Rodriguez*, likely dismissing it as 'inapposite' based on the *Ransier* majority's 'sufficiency' distinction. *But see infra* (although a different standard is applied, sufficiency cases often necessarily involve

the construction of a statute). However, *Rodriguez* found the evidence sufficient to constitute actual tampering based on its implicit construction of the Tampering statute—a construction which would likewise apply to Appellant, who similarly initially concealed evidence in his hand, even if he was ultimately unsuccessful in keeping it from the Trooper's later sight and recognition.

The *Ransier I* majority also adopted Appellant's erroneous timeline, essentially concluding Appellant did not conceal the evidence from Trooper Kral because Kral "knew where the syringe was at all times *from the point when he first saw the syringe in [Appellant's] hand*…." *See* Brief for the State at 34 (quoting Appellant's Brief, emphasis added); *see also Ransier I*, 594 S.W.3d at 10 ("from the point [Kral] saw appellant with the syringe in his hand[33] until the time he got him to the ground, he knew where the syringe was the whole time."). However, "Appellant prevented Kral's recognition of the syringe by covering or obscuring it in his hand and shielding it from view with his body" *before* Kral was eventually able to notice what was in Appellant's hand, after Kral changed his position repeatedly.[34]

[33] To the extent *Ransier I* implies Trooper Kral immediately saw and recognized what Appellant had in his hand, the entirety of Kral's testimony refutes that. *See supra*; see also Brief for the State at 36-39; *Ritcherson*, 568 S.W.3d at 677-78 (cautioning against examining answers in a vacuum and noting "the entirety of a witness's testimony must be considered when applying the second step of the lesser-included offense test.").

[34] The State extensively discussed how Appellant's timeline was erroneous. *See* Brief for the State at 34-40.

Under the *Ransier I* majority's proposition, if a given defendant conceals a syringe in his hand and plays 'keep away' from an officer beginning at 5 p.m., the officer finally sees what was in the defendant's hand at 5:30 p.m. after struggling with him for those 30 minutes, then finally wrestles it away after five more minutes, there would be no concealment, because 'from 5:30 p.m. until the time he got him to the ground at 5:35 p.m., the officer knew where the syringe was the whole time.' *See Ransier I*, 594 S.W.3d at 10.

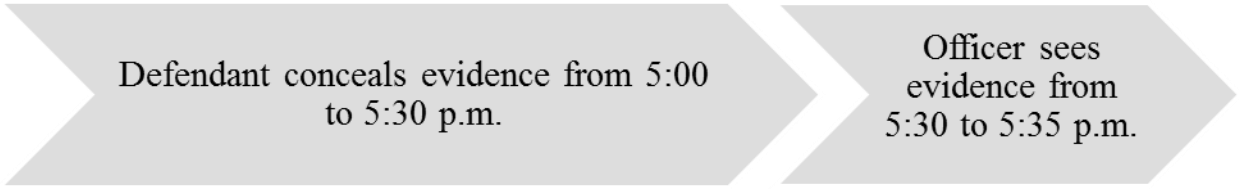
However, the defendant would have "'place[d] out of sight' or prevented 'recognition of'[35] the syringe before [the officer] was able to move around and finally recognize what it was, [and therefore] he 'concealed' the syringe under the

[35] As *Hines v. State* observed:

> Merriam-Webster's Collegiate Dictionary provides two definitions for "conceal": (1) "to prevent disclosure *or recognition of*" and (2) "to place out of sight." *Conceal*, Merriam-Webster's Collegiate Dictionary (11th ed. 2004). Under the first definition, invisibility is not a prerequisite. *A thing can be concealed merely by making it unrecognizable or unnoticeable*. Under either definition, however, *a dispositive inquiry is whether law enforcement noticed the object before the defendant tried to hide it and maintained visual contact*.

535 S.W.3d 102, 110 (Tex. App.—Eastland 2017, pet. ref'd) (emphasis added); *but see also Stahmann v. State*, 602 S.W.3d 573, 580-81 (Tex. Crim. App. 2020) (noting that while "[t]he outcome of this case might have been different had [two third-party witnesses] not been there, had they lost sight of what Stahmann threw or where it landed, had they not spoken to [the officer] and directed him to the pill bottle when he arrived, or had [the officer] had a difficult time locating it," the Court concluded in that case that "[a]ctual concealment requires a showing that the allegedly concealed item was hidden, removed from sight ***or*** notice, or kept from discovery or observation.") (emphasis added); *id*. at 584 (Yeary, J., Keller, P.J., Keel and Slaughter, JJ., dissenting) (discussing definitions similar to *Hines*' in other cases).

tampering statute." Brief for the State at 39; *id*. at 34-40. As the following further illustrated:



The 'concealment' timeline starts when the defendant *begins concealing the evidence at 5 p.m.*—not when the officer is finally able to observe what the defendant is concealing at 5:30 p.m. *See also id*. at 34-40; *Rodriguez,* 2016 Tex. App. LEXIS 6871 at *13-14; *Gaitan v. State*, 393 S.W.3d 400, 402 (Tex. App.—Amarillo 2012, pet. ref'd) ("That his effort was ultimately unsuccessful matters little…."). The *Ransier I* majority erred in adopting Appellant's erroneous timeline.[36]

[36] *See also* III R.R. at 69-70 (in responding to Appellant's motion for a directed verdict on 'concealment,' the State noted that Kral "said he couldn't see [the syringe] at first. He said he had to move around several times", and in rejecting motion, the Trial Court noted that Kral "wasn't aware of the presence [of the syringe] until he saw it").

II. The State "Is Entitled to Receive a Response From the Jury on Whether the Defendant Is Guilty of the Charged Offense[s],"[37] and "To Be Entitled to Lesser-Included [Instructions, a] Defendant Must Point to Evidence That Negates Every Alternate Theory of Liability for the Greater Offense."[38]

a. The *Ransier I* majority's new rule is contrary to the rationale underlying the "guilty only" rule as expressed in controlling case law.

Case law from this Court after *Stadt* explains the rationale behind the "guilty only" rule:

> We said that the "guilty only" rule was designed to preserve the integrity of the jury as a factfinder by ensuring that it was instructed on a lesser-included offense "only when that offense constitutes a valid, rational alternative to the charged offense."
> ….
>
> If the lesser offense is viewed in isolation, a jury's verdict would be rational so long as the lesser offense is included in the charging instrument and supported by legally sufficient evidence. The "guilty-only" prong of the *Royster-Rousseau* test requires, however, that we view the rationality of the lesser offense, not in isolation, but in comparison to the offense described in the charging instrument. But why should we make that comparison? The answer must be that the State is entitled to pursue the charged offense and, therefore, is entitled to receive a response from the jury on whether the defendant is guilty of the charged offense.

Grey, 298 S.W.3d at 649-50.

In the instant case, the State alleged Appellant tampered by three means: A) Appellant concealed the syringe in his hand or under the driver's seat; B) Appellant

[37] *Grey v. State*, 298 S.W.3d 644, 649-50 (Tex. Crim. App. 2009).
[38] *Feldman v. State*, 71 S.W.3d 738, 752-53 (Tex. Crim. App. 2002).

altered the syringe by changing its physical location; or C) Appellant altered the syringe by breaking the needle. Dissent at 6.[39] At least two of the theories—A or C—would have elevated the offense from 'attempted' tampering to 'actual' tampering. *See id*.; *see also Grey*, 298 S.W.3d at 649-50; *cf. Stahmann v. State*, 602 S.W.3d 573, 577 (Tex. Crim. App. 2020) (in construing the tampering statute, the Court rejected the second theory, though it further observed that "[w]hen the jury charge authorizes conviction on multiple theories of liability, we will sustain the conviction if the evidence is sufficient to prove *any* of the theories submitted in the jury charge") (emphasis added).

As the *Ransier* Dissent observed, "[t]he trial court submitted a single question asking the jury whether it found appellant guilty or not guilty of tampering with physical evidence…." Dissent at 2. Appellant had to show the record would allow a rational jury to conclude that he was "guilty only" of Attempted Tampering by addressing all three theories alleged by the State. Dissent at 5-6.

Instead, the 2-1 *Ransier I* majority has crafted a *new* "guilty only" rule positing that since two of the State's three theories included the statutory allegation of 'altering,' Appellant only had to negate *one of the two different* altering theories and the *one* concealing theory in order to be entitled to a lesser-included offense

[39] Moreover, Appellant failed to preserve his request for a lesser-included instruction when he failed to adequately articulate the evidence upon which he was relying. *See* PD-0477-19 (Ground One, Review Granted August 21, 2019), *available at*: http://search.txcourts.gov/Case.aspx?cn =PD-0477-19&coa=coscca .

instruction. *See Ransier I*, 594 S.W.3d at 8-9; *id*. at 9 ("Appellant makes this [guilty only] argument with respect to each alternative *statutory* theory on which the jury was charged.") (emphasis added).

Essentially, under the *Ransier I* majority's new rule, the jury could be asked to determine whether Appellant was "guilty only" of an attempt regarding two of the three offenses charged by the State ('A' or 'B'), while completely ignoring the final theory ('C'):

> Whether:
>
> ***A.*** Appellant concealed the syringe by hiding it in his right hand or under the driver's seat, though Trooper Kral ultimately discovered that Appellant was holding the syringe [or whether Appellant merely *attempted* to do so];
>
> ***B.*** Appellant altered the syringe by changing its physical location [or whether such only constituted an *attempt*]; or
>
> ***C.*** **Appellant altered or destroyed the syringe by breaking the needle from the barrel**.

Under the *Ransier I* majority's new rule, the jury could simply return a verdict of "attempted tampering" related to one 'altering' theory ('B'), and the jury would effectively be excused from answering whether Appellant committed *actual* tampering under the final 'altering' theory ('C') by breaking the syringe. *See id*. However, such a rule is directly contrary to *Grey*'s recognition that the State "is entitled to receive a response from the jury on whether the defendant is guilty of the charged offense[s]." *Grey*, 298 S.W.3d at 649-50; *see also id*. (only instruct on

lesser-included "when that offense constitutes a valid, rational alternative to the charged offense").

There is other case law from the Court of Criminal Appeals which conflicts with the *Ransier I* majority's new rule. *See In re State ex rel. Weeks*, 391 S.W.3d 117, 123 (Tex. Crim. App. 2013). In *Weeks*, the Court conditionally granted mandamus against a trial court for refusing to submit one of the State's legal theories to the jury. In finding the trial court had violated a ministerial duty, *Weeks* quoted the foregoing language from *Grey* that "the State is entitled to pursue the charged offense, and, therefore, is entitled to receive a response from the jury on whether the defendant is guilty of the charged offense." *Id*. at 123. The Court repeated *Grey*'s observation that "'It is the State … that chooses what offense is to be charged.' The State's charging choices, then, become part of the law applicable to the case." *Id*. The Court then stated:

> This concept—that the State chooses what offense to pursue—also applies to legal theories available to prove the charged offense. For example, it cannot be seriously maintained that the trial judge could refuse altogether to submit a charged offense to the jury when the evidence supports its submission and no legal reason otherwise exists to preclude its submission. *Likewise, one cannot seriously maintain that the trial judge could arbitrarily refuse to submit an alternative statutory method of committing the offense if that method were in the charging instrument and supported by the evidence.*

Weeks, 391 S.W.3d at 124 (emphasis added). The *Ransier* majority's new rule would require a trial court to do indirectly what *Weeks* would not allow it to do directly: a

trial court must now include a lesser-included instruction in its charge and omit (or allow the jury to ignore) one of the State's legal theories that could otherwise result in conviction for a greater offense. *But see cf. id*.; *Grey*, 298 S.W.3d at 649-50; *see also cf. Bailey v. Alabama*, 219 U.S. 219, 244 (1911) ("What the State may not do directly it may not do indirectly."); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (same).

b. *Stadt*'s 'criminal negligence' mens rea element actually negated all four theories of manslaughter in that case, and subsequent cases recognize the continuing requirement to challenge all greater-offense theories.

The *Ransier I* majority also misinterprets *Stadt* to be an endorsement of language in the Fourteenth Court's earlier opinion. 594 S.W.3d at 8 ("This does not mean an appellant must challenge every factual theory put forward by the state; rather, appellant must challenge every statutory theory which elevates the offense from the lesser to the greater offense"), citing *Stadt v. State*, 182 S.W.3d 360, 364 (Tex. Crim. App. 2005)[40]. However, *Stadt* did not hold that only *some* of the means of committing the greater offense needed to be negated.

In *Stadt*, the defendant was charged with manslaughter, and the indictment "alleged four alternate theories of reckless conduct on [the defendant's] part." 182

[40] *Stadt* appears to be obsolete on other grounds. *Grey*, 298 S.W.3d at 645 (when the *State* requests lesser-included instruction, it is not required to meet second prong of *Royster-Rousseau* test).

S.W.3d at 361. Because in that case "what elevated the offense from the lesser to the greater was the culpable mental state," a finding of "criminal negligence" *negated all four allegations of manslaughter*. *See id*. at 361-64.

Stadt Manslaughter Elements

1. **The appellant**	**2.** **recklessly**	**3. caused the death of an individual by the appellant's:** **A) unreasonable speed** **B) failing to maintain proper lookout** **C) failing to maintain a single lane; or** **D) changing lanes in an unsafe manner**

The 'single common element' in *Stadt* is distinguishable from Appellant's case.[41] For the sake of argument, even if a jury could find Appellant 1) only 'attempted' to alter the syringe by moving it, that would not allow a rational jury to conclude he was 'guilty only' of attempted tampering if he also either 2) altered the syringe by breaking it or 3) concealed the syringe, since those latter theories are for the greater offense of actual tampering. *See also Grey, supra* (the State "is entitled to receive a response from the jury on whether the defendant is guilty of the charged offense[s]").

[41] If *Stadt* had involved a *non-common* intent element and the appellant had negated only one of them—for example, negating *only* Aggravated Kidnapping under Tex. Penal Code § 20.04(a)(4) (inflict injury), where the State had also alleged § 20.04(a)(1) (ransom) and § 20.04(a)(5) (terrorizing)—the appellant would not be entitled to a lesser-included instruction. *See Arochi v. State*, No. 05-16-01208-CR, 2018 Tex. App. LEXIS 5200, at *52 (Tex. App.—Dallas July 11, 2018, pet. ref'd) (not designated for publication).

c. Other courts of appeal after *Stadt*—including the transferor Third Court [42] —recognize the continuing requirement that all greater-offense theories alleged by the State must be challenged to receive a lesser-included instruction.

Indeed, it appears the Fort Worth Court of Appeals in *Orona* recognized the 'single common' *mens rea* element in *Stadt* addressed all four theories at issue in that case, in the course of determining there was *not* evidence in *Orona* addressing every factual theory alleged by the State:

> …even assuming some evidence existed that Orona was unaware of Sartain's insulin-dependent diabetic condition, no evidence exists that Orona did not intentionally or knowingly cause Sartain's death by punching and kicking him in the face and head. If sufficient evidence of more than one theory of the greater offense is presented to allow the jury to be charged on alternate theories, the second prong of the test is satisfied only if there is evidence that, if believed, refutes or negates **every theory** that elevates the offense from the lesser to the greater. *See Arevalo v. State*, 970 S.W.2d 547, 549 (Tex. Crim. App. 1998). In other words, any evidence that Orona did not know that Sartain required insulin (negating one theory of murder) would not negate the remaining theories of the greater offense—that Orona intentionally or knowingly caused Sartain's death by kicking or punching him—to enable a rational jury to conclude that Orona was guilty *only* of the lesser-included offense of criminally negligent homicide. *See id*.; ***cf. Stadt v. State***, 182 S.W.3d 360, 363 (Tex. Crim. App. 2005) (holding lesser-included-offense instruction warranted when some evidence showed that defendant possessed lesser culpable mental state **applicable to each alterative theory alleged in indictment**). Consequently, the trial court did not err by refusing to instruct the jury on criminally negligent homicide.

[42] *See* Tex. R. App. P. 41.3. Although the Third Court case cited *infra* is unpublished (*see* Tex. R. App. P. 47.7), given the fact that the vast majority of criminal cases are now unpublished, the purpose underlying Tex. R. App. P. 41.3 supports the conclusion that a transferee court should nevertheless follow such a case from the transferor court, absent a compelling argument that the prior case was wrongly decided.

Orona v. State, 341 S.W.3d 452, 461 (Tex. App.—Fort Worth **2011**, pet. ref'd) (bold emphasis added, italics in original).[43]

III. The *Ransier I* Majority Incorrectly Dismissed Sufficiency Cases—Which Often Involve Statutory Construction—As Completely Inapposite, Despite This Court's Painstaking Consideration of Such Cases in *Bullock*.

The *Ransier I* majority dismissed sufficiency cases as inapposite. 594 S.W.3d at 3, 10 n.4. However, while the majority was correct that evidence is viewed in a different light in lesser-included instruction cases (*see Ritcherson*, *infra*), the *Ransier* majority was incorrect that sufficiency cases are completely inapposite. Indeed, the

[43] *See also Perkins v. State*, Nos. 05-17-00288-CR, 05-17-00379-CR, 2018 Tex. App. LEXIS 3537, at *7-8 (Tex. App.—Dallas May 17, **2018**, pet. ref'd) (not designated for publication) (finding no error in rejecting a lesser-included instruction, noting every theory properly submitted must be challenged and "Appellant does not challenge the evidence to support the conviction for murder under the felony murder theory."); *Schott v. State*, Nos. 03-11-00446-CR, 03-11-00447-CR, 03-11-00448-CR, 2013 Tex. App. LEXIS 5217, at *24 (Tex. App.—Austin Apr. 30, **2013**, no pet.) (not designated for publication) (Noting that even if evidence had showed appellant entered the apartment with consent but refused to leave after notice to depart, "such evidence would not negate the theories of the greater offense of burglary of a habitation—the intent to commit assault or theft, or the commission or attempted commission of assault or theft—to enable a rational jury to conclude that he was guilty only of the lesser-included offense of criminal trespass."); *see also, e.g.*, *Feldman*, 71 S.W.3d at 752-53 (some internal citations omitted) (pre-*Stadt* case finding no error in denying a lesser-included instruction):

> …a finding that the murders could have been committed during different criminal transactions does not mean that the jury could have found appellant guilty *only* of murder. The jury in the instant case was also authorized to convict appellant of capital murder if it found that the murders were committed during *different* transactions, but pursuant to the same scheme or course of conduct. Hence … appellant must also show that the record contains some evidence that would have allowed a rational jury to find that he did not murder Velasquez and Everett pursuant to the same scheme or course of conduct. *See Arevalo*, 970 S.W.2d at 549 (to be entitled to lesser-included, defendant must point to evidence that negates every alternate theory of liability for the greater offense)[.]

detailed analysis in the Court of Criminal Appeals case *Bullock v. State*—which was cited in the *Ransier I* majority opinion[44]—demonstrated the contrary.

a. Sufficiency cases often turn on statutory construction, which is a question of law for the Courts to decide.

In some cases the "sufficiency-of-the-evidence issue turns on the meaning of the statute under which the defendant has been prosecuted," requiring appellate construction of the statute. *See Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015). Notably, "[a]ppellate construction of a statute may be necessary to resolve an eviden[tiary] sufficiency complaint [in part because] alternative statutory interpretations would yield dissimilar outcomes." *Moore v. State*, 371 S.W.3d 221, 227 (Tex. Crim. App. 2012) (emphasis added). An appellate court must assess whether "certain conduct actually constitute[s] an offense under the statute with which the defendant has been charged." *Liverman*, 470 S.W.3d at 836. Statutory construction is a question of law, which is reviewed *de novo*. *Id*.

b. *Bullock* did not dismiss sufficiency cases as completely 'inapposite;' instead, it took pains to distinguish sufficiency opinions which had explicitly or implicitly construed the statute at issue.

In *Bullock*, cited by the *Ransier I* majority, this Court recognized four sufficiency cases involved the appellate courts' construction of the tampering

[44] *See, e.g.*, 594 S.W.3d at 7-8, 11-12.

statute. *Bullock* took pains to distinguish its factual circumstances from those four cases—which had already found certain conduct sufficient to constitute 'exercising control' under the theft statute. *See Bullock v. State*, 509 S.W.3d 921, 927-28 (Tex. Crim. App. 2016). *Bullock* then concluded that one possible view of its facts would *not* constitute 'exercising control' under the statute (*i.e.*, if Bullock's "feet were not on the pedals and … he did not turn on the ignition or move the truck").[45] Because a jury rationally could have found the appellant was 'guilty only' of that fact pattern, a lesser-included instruction of attempted theft should have been given. *See id.*[46]

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[45] To further illustrate *Bullock*'s analysis, First, the Court might have determined that there were five rational views of the evidence the jury could have found in *Bullock*: fact patterns 'A' through 'E.' Second, the Court determined that—while 'sufficiency' opinions had already construed '*A' through 'D'* to constitute 'exercising control,' at least one of those fact patterns—'E' (*i.e.*, if Bullock's "feet were not on the pedals and … he did not turn on the ignition or move the truck")—had not been construed under the statute. *See, e.g.*:

Bullock	*Barnes*	*Ward*	*Esparza*	*Krause*
A	A = 'Control'			
B		B = 'Control'		
C			C = 'Control'	
D				D = 'Control'
E				

See id. at 927-28. Third, the Court then had to construe the statute itself to determine whether 'E' would constitute 'exercising control.' *See id.* at 928.

Because the *Bullock* Court itself concluded that fact pattern 'E' would *not* constitute exercising control, and because a jury rationally could have found that appellant was 'guilty only' of fact pattern 'E,' a lesser-included instruction of attempted theft should have been given. *See id.*

Notably, in the above scenario, if the Court had concluded the evidence would *only have supported a rational jury finding of 'A' through 'D,'* since each of those fact patterns had already been held 'sufficient' to constitute 'exercising control,' the Court would have either: 1) concluded that Bullock *was not* entitled to a lesser-included instruction, or 2) the Court would have overruled or distinguished one of the opinions which had construed such conduct to be 'sufficient.'

[46] If *Bullock* had concluded *either* 1) a rational jury *could not* find the appellant 'guilty only' of that fact pattern *or* 2) the Court concluded that fact pattern *constituted 'exercising control'* under the statute, a lesser-included instruction *would not* have been required. *See id.; see also id.* at 932 (Newell, J., Keller, P.J., and Keel, J., dissenting).

In dismissing sufficiency cases as 'inapposite,' the *Ransier I* majority relied on language in *Ritcherson*; however, that case only stands for the proposition that in determining whether a lesser-included instruction was warranted, the evidence is viewed in a different light than in sufficiency cases. *See Ritcherson*, 568 S.W.3d at 676. *Ritcherson* never held—directly or indirectly—that 'statutory construction sufficiency cases' were 'completely inapposite' when considering entitlement to a lesser-included offense instruction. To the contrary, *Ritcherson* cited to the aforementioned *Bullock* case, though it never questioned or overruled *Bullock*'s extensive consideration of sufficiency 'statutory construction' cases. *Id*. at 671.

In reconciling the foregoing case law, the question in such lesser-included cases is:

> 1) When viewing the evidence in the light most favorable to giving the lesser-included instruction, 2) could the evidence support a rational jury finding that Appellant had committed only conduct 3) which would make him 'guilty *only*' of a lesser-included 'attempt' offense under the statutory construction of the law decided by the courts?

Accordingly, the *Ransier I* majority's conclusion that legal sufficiency cases are completely 'inapposite' is incorrect; such cases are still useful to help show what conduct constitutes a completed offense instead of merely an 'attempt,' and the

Fourteenth Court should have considered the facts of the instant case in light of those prior constructions.[47]

c. The *Ransier* majority should have construed the tampering statute itself to determine if a rational jury could find Appellant 'guilty *only*' of conduct which did not constitute actual tampering.

Alternatively, the *Ransier* majority should have construed the Tampering statute itself regarding the State's three theories, and should have been able to point to evidence[48] from which a rational jury could find Appellant 'guilty *only*' of attempted Tampering under each theory.

[47] The *Ransier I* majority apparently indicated that the construction and interpretation of the Tampering statute should be left to the jury (*see* 594 S.W.3d at 12-13)—and then reversed the Tampering verdict, despite the jury's flat rejection of Appellant's 'Attempted Tampering' argument. *But see Moore*, 371 S.W.3d at 227; *Liverman*, 470 S.W.3d at 836.

[48] Moreover, as noted *supra*, Appellant failed to preserve his request for a lesser-included instruction when *he* failed to adequately articulate the evidence upon which he was relying. *See* PD-0477-19 (Ground One, Review Granted August 21, 2019), *available at*: http://search.txcourts.gov/Case.aspx?cn =PD-0477-19&coa=coscca .

Conclusion

Appellant was criminally responsible for *actual* tampering by either breaking the syringe or concealing the syringe with the requisite intent. Because—given the totality of the record—Appellant could point to no affirmative evidence from which a rational jury could conclude he was "guilty *only*" of *attempting* to tamper with the evidence, the Trial Court did not err in refusing his request for a lesser-included offense instruction.

Prayer

Wherefore, premises considered, the Appellee State respectfully prays that this Honorable Court reverse *Ransier I* and *II* and remand to the Fourteenth Court to resolve Appellant's final complaint.[49] The State also prays for all other relief to which it may be entitled.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the instant Brief is computer-generated using Microsoft Word and said computer program has identified that there are 13,423 words or less within the portions of this Brief required to be counted by the Texas Rules of Appellate Procedure. The document was prepared in proportionally-spaced typeface using Times New Roman 14 for text and Times New Roman 12 for footnotes.

/s/ Joshua D. Presley
Joshua D. Presley

[49] The lower Court did not address Appellant's "ex-con" complaint with regard to his Tampering offense because of its reversal based on the lesser-included-instruction issue. *Ransier*, 594 S.W.3d at 6; *see also* Brief for the State at 6-25 (addressing Appellant's "ex-con" complaint).

Certificate of Service

I, Joshua D. Presley, Assistant District Attorney for the State of Texas, Appellee, hereby certify that a true and correct copy of this *State's Brief on Discretionary Review*, along with the attached *Appendix*, has been sent to the following:

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By electronically sending it to the above-listed email addresses through efile.txcourts.gov, this the 17th day of September, 2020.

/s/ Joshua D. Presley
Joshua D. Presley

Appendix

"A" – *Ransier v. State* [*I*], 594 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2019, pet. granted)

"B" – *Ransier Dissent,* *available at:* http://search.txcourts.gov/Case.aspx?cn=14-17-00580-CR&coa=coa14 (designated for publication)

"C" – *Ransier v. State* [*II*], Nos. 14-17-00580-CR, 14-17-00581-CR, 2019 Tex. App. LEXIS 9360 (Tex. App.—Houston [14th Dist.] Oct. 24, 2019, pet. granted) (designated for publication)

"D" – *Tex. Penal Code § 6.04, § 7.01, § 7.02, § 37.09*

"E" – *Thompson v. State*, 236 S.W.3d 787, 789 (Tex. Crim. App. 2007)

"F" – *Thompson v. State*, No. 05-04-00537-CR, 2005 Tex. App. LEXIS 5817, at *1 (Tex. App.—Dallas July 27, 2005, pet. ref'd) (not designated for publication)

Ransier v. State

Court of Appeals of Texas, Fourteenth District, Houston

July 16, 2019, Opinion Filed

NO. 14-17-00580-CR, NO. 14-17-00581-CR

Reporter
594 S.W.3d 1 *; 2019 Tex. App. LEXIS 6021 **

CHARLES ROBERT RANSIER, Appellant v. THE STATE OF TEXAS, Appellee

Notice: PUBLISH — TEX. R. APP. P. 47.2(b).

Subsequent History: Supplemental opinion at, On rehearing at, Reconsideration denied by, En banc, As moot, Without prejudice *Ransier v. State, 2019 Tex. App. LEXIS 9360 (Tex. App. Houston 14th Dist., Oct. 24, 2019)*

Petition for discretionary review granted by *Ransier, 2020 Tex. Crim. App. LEXIS 585 (Tex. Crim. App., Aug. 19, 2020)*

Prior History: [1]** On Appeal from the 207th District Court, Comal County, Texas. Trial Court Cause Nos. CR2016-303 & CR2017-004.

Core Terms

syringe, tampering, lesser-included, needle, concealed, lesser, destroy, truck, noticed, seat, rid, abandonment, Dictionary, scintilla, broke, shove

Case Summary

Overview

HOLDINGS: [1]-Defendant's trial counsel unequivocally conceded guilt on the possession charge during closing arguments at trial; [2]-Defendant showed more than a scintilla of evidence directly germane to attempted tampering, and with respect to altering and destroying, circumstantial evidence existed from which the jury could have reasonably inferred that defendant did not break the syringe; [3]-The witness testimony refuted or negated other evidence that defendant concealed the syringe; [4]-Any breakage, concealment, or alteration following the struggle was incidental to the struggle and at least arguably involuntary as to defendant; [5]-Defendant suffered some harm because the maximum imprisonment

for attempted tampering with evidence would have been 20 years, whereas defendant received a life sentence arising from his felony conviction for tampering with evidence.

Outcome

Judgment affirmed in part and reversed in part.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Reviewability > Waiver > Triggers of Waivers

HN1 **Waiver, Triggers of Waivers**

When assessing the meaning of an attorney's statement that he or she has no objection in regard to a matter that may have been previously considered and ruled upon, courts should first ask whether the record as a whole plainly demonstrates that the defendant did not intend, nor did the trial court construe, his no objection statement to constitute an abandonment of a claim of error that he had earlier preserved for appeal. If, after applying the test, it remains ambiguous whether abandonment was intended, then the appellate court must resolve the ambiguity in favor of finding waiver.

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Evidence Tampering > Elements

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Lesser Included Offenses

Criminal Law & Procedure > Criminal Offenses > Lesser Included Offenses > Miscellaneous Crimes

HN2 **Evidence Tampering, Elements**

To determine whether the trial court was required to give a requested charge on a lesser-included offense, the appellate court uses a two-step test. First, it determines whether the requested instruction pertains to an offense that is a lesser-included offense of the charged offense. Attempted tampering with evidence is a lesser-included offense to tampering with evidence, *Tex. Code Crim. Proc. Ann. art. 37.09(4)*. Second, the appellate court assesses whether evidence in the record supports giving an instruction on the lesser-included offense to the jury. A defendant is entitled to such an instruction when there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. The evidence must establish that the lesser included offense is a valid, rational alternative to the charged offense.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Lesser Included Offenses

HN3[] **Particular Instructions, Lesser Included Offenses**

If the jury is charged on alternate theories, the second prong of the lesser-offense test is met only if there is evidence which, if believed, refutes or negates every theory which elevates the offense from the lesser to the greater. Only if every theory properly submitted is challenged would the jury be permitted to find the defendant guilty only of the lesser offense. This does not mean an appellant must challenge every factual theory put forward by the State; rather, appellant must challenge every statutory theory which elevates the offense from the lesser to the greater offense.

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Evidence Tampering > Elements

HN4[] **Evidence Tampering, Elements**

Tex. Penal Code Ann. § 37.09(a)(1) defines the offense of tampering with physical evidence as follows: (1) knowing that an investigation or official proceeding is pending or in progress; (2) a person alters, destroys, or conceals any record, document, or thing; (3) with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding. *Section 37.09(d)(1)* alternatively defines the offense of tampering with physical evidence as: (1) knowing that an offense has been committed; (2) a person alters, destroys, or conceals any record, document, or thing; (3) with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense.

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

HN5[] **Attempt, Elements**

A person commits an attempt if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended, *Tex. Penal Code Ann. § 15.01(a)*.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Lesser Included Offenses

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Weight of Evidence

HN6[] **Particular Instructions, Lesser Included Offenses**

When the record provides more than a scintilla of evidence from which the jury could have rationally determined that the defendant was guilty only of a lesser-included offense, then the defendant is entitled to a jury charge on that lesser offense. This is true even if such a

determination would require the jury to believe only portions of certain witnesses' testimony. It is the jury's province to decide which parts of this evidence to believe.

Criminal Law & Procedure > Appeals > Reversible Error > Jury Instructions

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Jury Instructions

HN7 **Reversible Error, Jury Instructions**

The erroneous refusal to give a requested instruction on a lesser-included offense is charge error subject to an Almanza harm analysis. Under Almanza, when jury-charge error has been preserved, the appellate court will reverse if the error in the court's charge resulted in some harm to the accused.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Jury Instructions

HN8 **Harmless & Invited Error, Jury Instructions**

The harm from denying a lesser offense instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer. Ordinarily, if the absence of a charge on the lesser-included offense left the jury with the sole option either to convict the defendant of the charged offense or to acquit him, some harm exists.

Counsel: For APPELLANT: Amanda Erwin, SAN MARCOS, TX.

For STATE: Joshua Presley, Sammy M. McCrary, NEW BRAUNFELS, TX; Stacey M. Soule, AUSTIN, TX.

Judges: Panel consists of Justices Jewell, Zimmerer, and Spain. (Jewell, J., dissenting.).

Opinion by: Charles A. Spain

Opinion

[*4] OPINION[1]

A jury convicted appellant Charles Robert

[1] The Supreme Court of Texas ordered this case transferred from the Court of Appeals for the Third Court of Texas to this court. Misc. Docket. No. 17-9066 (Tex. June 20, 2017); *see* Tex. Gov't Code Ann. §§ 73.001, .002. Because of the transfer, we decide the case in accordance with the precedent of the transferor court under principles of stare decisis—if our decision otherwise would have been inconsistent with the transferor court's precedent. *See* ***Tex. R. App. 41.3***.

Ransier and assessed punishment **[*5]** at life in prison for tampering with a syringe. *Tex. Penal Code Ann. § 37.09* (trial court cause number CR2016-303 and appellate case number 14-17-00580-CR). The same jury also convicted and sentenced appellant to twenty-years confinement on a charge of possession of a controlled substance, less than one gram. *Tex. Health & Safety Code Ann. § 481.115(a)* (trial court cause number CR2017-004 and appellate case number 14-17-00581-CR). Appellant argues that the trial court erred by (1) admitting evidence that appellant was an "ex-con" in the guilt/innocence phase of trial and (2) by denying his request for a jury instruction on a lesser-included offense. We affirm the trial court's judgment on possession of a controlled substance because appellant conceded possession of a controlled substance at trial. We reverse the trial court's judgment on tampering with physical evidence and remand the case to the trial court for further proceedings because appellant was entitled to **[**2]** a lesser-included instruction.

I. Background

In March 2015, DPS Trooper Kral was on patrol when he noticed a children's slide sitting on the side of the road. Later the same day, Kral noticed the slide had been moved and a truck was parked beside it. Kral decided to investigate.

After approaching the truck, Kral saw appellant and asked him if he could search the truck. Appellant agreed to remove items from the truck. While appellant was removing items, Kral stood alongside the truck and observed. Kral watched appellant's hands and his movements and noticed that appellant was "trying to make some kind of movement and basically shoving his right hand underneath the driver's side seat." Appellant had a syringe in his hand and was trying to break the syringe and shove it underneath the seat.

Kral asked appellant, "Hey, what's in your right hand?" Kral ordered, "Hey get back over here," and "Get back away from the car." Appellant did not comply with Kral's commands and continued "trying to break [the syringe] and shove it under the seat." Struggle ensued as Kral again stated, "Back away from the car." Kral grabbed appellant by the shoulder and forced him out of the truck. Appellant fell to **[**3]** the ground. On the ground, appellant still held the syringe, but tried to throw it aside. The syringe landed about two feet from appellant. Kral got on top of appellant and put appellant in handcuffs.

Appellant was arrested and taken to the police department, where he was interviewed by Kral and Texas Ranger Jones. In appellant's recorded interview, Kral asked appellant, "[w]hen you were going after that syringe, were you trying to break it or trying to get rid of it?" Appellant responded, "That was the intention, yes sir." Later, appellant further responded, "Look, I'm an ex-con. I'm not going to tell—hey man, this is [inaudible] dope in here."

Liquid was removed from the syringe and tested in the DPS crime lab. The testing determined the liquid was

methamphetamine.

Appellant was subsequently indicted for tampering with physical evidence and possession of a controlled substance, less than one gram. Appellant was tried on both charges in one trial.

On direct-examination at trial, Kral testified that, initially, he "couldn't necessarily see what was in appellant's right hand," **[*6]** but then realized it was a syringe. Kral testified that when he recovered the syringe after appellant tossed it **[**4]** away, the tip of it was broken off. Kral further testified that appellant concealed the syringe from him, appellant "altered" the syringe by moving it, and appellant also altered the syringe by breaking it.

During Kral's direct-examination, the State presented the portion of appellant's recorded interview in which appellant admitted to trying to break or get rid of the syringe and identified himself as an ex-con.

On cross-examination, Kral conceded he had no knowledge of the condition of the syringe prior to noticing it in appellant's hand. Kral did not know how the needle was connected to the syringe. Kral acknowledged that he did not find the tip of the syringe and did not take pictures of it. Kral admitted that in his report on the incident he did not state that appellant broke the syringe, and in appellant's four-hour recorded video, Kral never said appellant broke the syringe. Kral testified that he could not determine whether appellant's falling to the ground after being thrown caused the needle to break off. Kral agreed that from the point he saw appellant with the syringe in his hand until the time he got him to the ground, he knew where the syringe was the whole time. Kral also **[**5]** agreed that while the syringe was in appellant's hand, it was only partially concealed.

After the close of evidence, appellant asked the trial court for a lesser-included instruction on attempted tampering. The trial court denied the request.

During closing arguments, appellant's trial counsel admitted appellant was guilty of possession of a controlled substance, stating "I am going to tell you right off the bat we concede on the possession of a controlled substance. He had it in his hand. You know, he knew there was something in there, we're conceding that." Regarding tampering with physical evidence, he argued appellant was not guilty. Appellant's trial counsel urged the jury, "At best it is an attempt at tampering, but you don't have attempt at tampering in front of you."

The jury convicted appellant on both possession of a controlled substance and tampering with physical evidence. After reviewing extensive evidence of appellant's past criminal history during the punishment phase of trial, the jury gave appellant the maximum imprisonment on each of his charges, both enhanced by prior felony convictions—life in prison for tampering and twenty-years confinement for possession.

II. Analysis [**6]

We do not address appellant's first issue in

which appellant asserts the trial court erred by admitting evidence that appellant was an "ex-con" for two reasons. With respect to the possession case against appellant, we do not address the issue because appellant's trial counsel unequivocally conceded guilt on the possession charge during closing arguments at trial. With respect to the tampering case against appellant, we do not reach the issue because of our disposition of appellant's second issue (reverse and remand for further proceedings). *See Tex. R. App. P. 47.1*.

In his second issue, appellant contends that the trial court erred in refusing to submit his requested instruction regarding the lesser-included offense of attempted tampering with evidence. As an initial matter, we address the State's contention that appellant waived this point of error. The State contends appellant waived error because, when the trial court asked if there were any objections to the charge, **[*7]** appellant responded, "No objection." We disagree.

HN1[] "[W]hen assessing the meaning of an attorney's statement that he or she has 'no objection' in regard to a matter that may have been previously considered and ruled upon, courts should first **[**7]** ask whether 'the record as a whole plainly demonstrates that the defendant did not intend, nor did the trial court construe, his "no objection" statement to constitute an abandonment of a claim of error that he had earlier preserved for appeal.'" *Stairhime v. State, 463 S.W.3d 902, 906 (Tex. Crim. App. 2015)* (quoting *Thomas v. State, 408 S.W.3d 877, 885 (Tex. Crim. App. 2013))*. If, after applying the test, it remains ambiguous whether abandonment was intended, then we must resolve the ambiguity in favor of finding waiver. *Stairhime, 463 S.W.3d at 906*.

The record plainly demonstrates that appellant did not intend, and neither the trial court nor the State could have construed, his "no objection" statement to constitute an abandonment of his request for a lesser-included instruction. Immediately before the trial court asked if there were any objections to the charge, appellant strongly advocated for a lesser-included instruction and the trial court denied his request. Appellant then suggested that the denial could be error, and in response, the prosecutor indicated he would "deal with it" on appeal:

> The Court: No. Denied.
> [Defense counsel]: On attempted, really? Okay.
> . . . .
> The Court: If it is in error not to give attempting—
> [Defense counsel]: I think you're going to—that could be a problem, judge.
>
> [State]: I don't think it is a problem **[**8]** at all. I will be happy to deal with it.
> The Court: All right.
> (Off the Record)
> The Court: Let the record reflect the defendant is present with counsel, D.A. is present. The State has proposed a charge of the court. I made one typographical change on page two. Inserting the word "upon" instead of "on" in line two of paragraph F. And nobody—are there any objections to the charge with that change by the State?
> [Prosecutor]: No, sir.

The Court: By the defense?

[Defense counsel]: No objection.

During closing arguments, appellant's trial counsel continued to argue that appellant's actions constituted attempted tampering, not tampering.

The proximity of the trial court's denial of appellant's request to the trial court's call for objections to the charge, the discussion between the court and counsel in which the State expressed eagerness to "deal with" the issue on appeal, and appellant's emphasis on attempted tampering in closing argument plainly show that appellant did not intend to abandon his request. His "no objection" statement did not constitute an abandonment of his request for an instruction on attempted tampering. *See id.* We proceed to address the merits of the issue.

HN2[⬆] To determine whether **[**9]** the trial court was required to give a requested charge on a lesser-included offense, we use a two-step test. *Bullock v. State, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016)*. First, we determine whether the requested instruction pertains to an offense that is a lesser-included offense of the charged offense. *Id.* The State does not dispute that attempted tampering with evidence is a lesser-included offense to tampering with evidence. *See Tex. Code Crim. Proc. Ann. art. 37.09(4)* **[*8]** ("An offense is a lesser included offense if . . . it consists of an attempt to commit the offense charged or an otherwise included offense."). Accordingly, the first step of the test is satisfied.

Second, we assess whether evidence in the record supports giving an instruction on the lesser-included offense to the jury. *Bullock, 509 S.W.3d at 924-25*. A defendant is entitled to such an instruction when there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. *Id. at 925*. "The evidence must establish that the lesser included offense is a valid, rational alternative to the charged offense." *Id.*

The second step requires examining all the evidence admitted at trial. *Id.* "However, we may not consider the credibility of the evidence and whether it conflicts **[**10]** with other evidence or is controverted." *Id.* (quoting *Goad v. State, 354 S.W.3d 443, 446-47 (Tex. Crim. App. 2011))*. Anything more than a scintilla of evidence is adequate to entitle a defendant to a lesser charge. *State v. Sweed, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011)*. However, there must be some evidence directly germane to the lesser-included offense. *Roy v. State, 509 S.W.3d 315, 317 (Tex. Crim. App. 2017)*; *Cavazos v. State, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012)*. The second step may be satisfied if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations. *Sweed, 351 S.W.3d at 68*.

HN3[⬆] If the jury is charged on alternate theories, the second prong of the lesser-offense test is met "only if there is evidence which, if believed, refutes or negates every theory which elevates the offense from the lesser to the greater." *Ritcherson v. State, 568 S.W.3d 667, 671 (Tex. Crim. App. 2018)* (quoting *Arevalo v. State, 970 S.W.2d*

547, 549 (Tex. Crim. App. 1998) (per curiam)). "Only if every theory properly submitted is challenged would the jury be permitted to find the defendant guilty *only* of the lesser offense." *Arevalo, 970 S.W.2d at 549*. This does not mean an appellant must challenge every factual theory put forward by the State; rather, appellant must challenge every statutory theory which elevates the offense from the lesser to the greater offense. In *Stadt v. State*, this court noted that in "*Arevalo* [] and in other cases stating that principle, the 'alternate theories' were statutory theories **[**11]** elevating the offense from the lesser to the greater offense." *120 S.W.3d 428, 440 (Tex. App.—Houston [14th Dist.] 2003) aff'd, 182 S.W.3d 360 (Tex. Crim. App. 2005)*. Indicating approval of this court's holding in *Stadt*, the Criminal Court of Appeals similarly held:

> The question before us is not whether there was some evidence presented at appellant's trial that would permit a rational jury to find that he was not guilty of each and every alternate theory of manslaughter alleged in the indictment but whether there was some evidence presented at appellant's trial that would permit a rational jury to find that he possessed the culpable mental state of criminal negligence rather than recklessness.

Stadt v. State, 182 S.W.3d 360, 364 (Tex. Crim. App. 2005).

HN4[↑] *Penal Code section 37.09(a)(1)* defines the offense of tampering with physical evidence as follows: (1) knowing that an investigation or official proceeding is pending or in progress; (2) a person alters, destroys, or conceals any record, document, or thing; (3) with intent to impair its verity, legibility, or availability as evidence **[*9]** in the investigation or official proceeding. *Tex. Penal Code Ann. § 37.09(a)(1)*; *Rabb v. State, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014)*.

Penal Code section 37.09(d)(1) alternatively defines the offense of tampering with physical evidence as: (1) knowing that an offense has been committed; (2) a person alters, destroys, or conceals any record, document, or thing; (3) with intent to impair its verity, legibility, **[**12]** or availability as evidence in any subsequent investigation of or official proceeding related to the offense. *Tex. Penal Code Ann. § 37.09(d)(1)*.

HN5[↑] A person commits an attempt if, "with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." *Tex. Penal Code Ann. § 15.01(a)*.

Appellant asserts that he was entitled to an instruction on the lesser-included offense of attempted tampering with evidence because a rational jury could have found that, if appellant was guilty, he was only guilty of attempted tampering with physical evidence. Appellant makes this argument with respect to each alternative statutory theory on which the jury was charged. Appellant argues that a jury could have rationally found him only guilty of attempted tampering with regard to altering

the syringe.[2] Appellant argues that a jury could have rationally found him only guilty of attempted tampering with regard to destroying the syringe. Appellant argues that a jury could have rationally found him only guilty of attempted tampering with regard to concealing the syringe. We agree. Appellant shows more than a scintilla of evidence directly germane to attempted tampering was presented **[**13]** at trial.

With respect to altering and destroying, circumstantial evidence existed from which the jury could have reasonably inferred that appellant did not break the syringe. Kral testified that he had no knowledge of the condition of the syringe prior to noticing it in appellant's hand, and after he noticed it in appellant's hand, Kral still could not tell the full condition of the needle. Kral testified that appellant fell to the ground with the syringe in his hand after Kral pulled him away from the truck. Kral testified that he could not determine whether appellant's falling to the ground after being thrown caused the needle to break off.[3] In his report of the incident, **[*10]** Kral did not state that appellant broke the syringe. A rational jury could have believed Kral's affirmative testimony that he had no knowledge regarding the condition of the syringe, he did not document the condition of the syringe or needle, and he did not know whether the needle was broken by appellant's fall. A rational jury could have believed Kral's testimony that appellant fell to the ground with the syringe in his hand and reasonably inferred that that the syringe was broken by the fall. In addition, in **[**14]** appellant's recorded interview, Kral asked appellant, "[w]hen you were going after that syringe, were you *trying* to break it or *trying* to get rid of it?" (emphasis added). Appellant responded, "that was the intention, yes sir." A rational jury could have reasonably inferred that Kral questioned appellant about "trying" to break the syringe and "trying" to get rid of syringe because appellant had failed to break or get rid of the syringe. This evidence refutes or negates other evidence that appellant altered or destroyed the syringe.

With respect to whether appellant concealed the syringe, Kral testified that he was watching appellant remove items from appellant's truck and from the point he saw appellant with the syringe in his hand until the time he got him to the ground, he knew

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[2] We do not agree with the dissent's suggestion that we need not address appellant's arguments because appellant did not challenge on appeal the State's theory that appellant altered the syringe by moving it. The dissent points out that, at trial, the State argued that appellant altered the syringe by breaking the needle from the barrel or changing the physical location of the syringe, and on appeal, appellant does not address the argument that appellant altered the syringe by changing the physical location of the syringe. While appellant is required to show there is some evidence presented at trial that would permit a rational jury to find that he did not alter the syringe, appellant is not required to challenge every factual theory concerning its alteration on appeal. *See* Stadt, 120 S.W.3d at 440.

Moreover, appellant's burden to show entitlement to a lesser-included instruction is evidentiary—to show some evidence presented at trial would permit a rational jury to conclude he was only guilty of the lesser-included offense. The evidence concerning appellant's movement of the syringe is undisputed. The State's argument in this regard is not evidentiary; rather, the State contends that movement constitutes alteration as a matter of law. Consequently, we do not agree with the dissent that appellant was required to set forth some evidence refuting or negating the fact that appellant moved the syringe.

[3] The State contends that even if Kral throwing appellant to the ground caused the syringe to break, appellant would be criminally responsible for tampering with evidence. The State has not cited any authority, and we have found none, supporting this argument.

where the syringe was the whole time. Kral agreed that while the syringe was in appellant's hand, it was only partially concealed. This testimony refutes or negates other evidence that appellant concealed the syringe.

The State responds that appellant was not entitled to a lesser-included instruction because the evidence shows (1) appellant "actually broke" the syringe, (2) appellant concealed[4] the syringe by **[**15]** holding it in his hand and under the seat, and (3) appellant altered the syringe by moving its location. The dissent concludes the trial court's ruling is supported by the State's first theory. We are not persuaded by the State's theories or the reasoning of the dissent. The State and the dissent point to several pieces of evidence from which a jury could have concluded that appellant was guilty of the greater offense, but this evidence the State and the dissent point to is not dispositive. *See* *Goad, 354 S.W.3d at 448*. At most, it would contradict the theory that appellant attempted to but did not tamper with evidence. *See id.*

Even if the jury could have rationally concluded appellant did destroy, conceal, or alter the syringe, that is not the proper standard of our analysis. *See* *id. at 449*; *see also* *Ritcherson, 568 S.W.3d at 676* ("The issue is not whether a rational jury could have found Appellant guilty of murder; it is whether a jury could have reasonably interpreted the record in such a way that it could find Appellant guilty of only manslaughter."); *Wortham v. State, 412 S.W.3d 552, 558 (Tex. Crim. App. 2013)* ("The court of appeals' and the State's reliance on the overwhelming medical evidence **[*11]** presented in this case is in error."). We must review the totality of the evidence "without reference **[**16]** to the credibility of the evidence or whether that evidence is controverted or conflicting." *Bullock, 509 S.W.3d at 929*; *see also* *Ritcherson, 568 S.W.3d at 676* (citing *Thomas v. State, 699 S.W.2d 845, 859 (Tex. Crim. App. 1985)* (Teague, J., dissenting), for proposition that when determining whether defendant is entitled to instruction on lesser-included offense, facts should be viewed in light most favorable toward submitting lesser-included offense). ***HN6***[] When, as here, the record provides more than a scintilla of evidence from which the jury could have rationally determined that the defendant was guilty only of a lesser-included offense, then the defendant is entitled to a jury charge on that lesser offense. *Bullock, 509 S.W.3d at 929*. "This is true even if such a determination would require the jury to believe only portions of certain witnesses' testimony." *Id.* "[I]t is the jury's province to decide which parts of this evidence to believe." *Id.*

In this case, evidence concerning the

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[4] The State cites *Hines v. State, 535 S.W.3d 102, 110 (Tex. App.—Eastland 2017, pet. ref'd)*; *Stuart v. State, No. 03-15-00536-CR, 2017 Tex. App. LEXIS 5165, 2017 WL 2536863, at *4 (Tex. App.—Austin June 7, 2017, no pet.)* (mem. op., not designated for publication); *Munsch v. State, No. 02-12-00028-CR, 2014 Tex. App. LEXIS 9306, 2014 WL 4105281, at *6 (Tex. App.—Fort Worth Aug. 21, 2014, no pet.)* (mem. op., not designated for publication); and *Gaitan v. State, 393 S.W.3d 400, 401-02 (Tex. App.—Amarillo 2012, pet ref'd)*, in support of its argument that appellant concealed the syringe. These cases are inapposite as they involve review of the sufficiency of the evidence on a tampering conviction, not the trial court's denial of an appellant's request for a lesser-included instruction. *See infra* pp. 14-17.

condition of the needle prior to the struggle between Kral and appellant was conflicting, there was evidence that appellant fell to the ground with the needle in his hand, and appellant was questioned about his attempt to break or get rid of the syringe; thus, there was some evidence that appellant did not successfully alter or destroy the syringe **[**17]** by breaking the needle from the barrel or moving its location. Citing *Cavazos, 382 S.W.3d at 385*, the dissent concludes that the evidence regarding the condition of the needle is not affirmative evidence. The dissent also concludes that Kral's testimony that he could not determine whether appellant's falling to the ground after being thrown caused the needle to break off is not affirmative evidence. We respectfully disagree with these characterizations. While we do not consider such evidence direct evidence that the syringe was not intact before the encounter or that the needle was broken by appellant's fall, we do consider it affirmative circumstantial evidence from which a rational jury could reasonably have inferred as much. *See also Ritcherson, 568 S.W.3d at 676-77* (holding *Cavazos* distinguishable as *Cavazos* involved defendant who shot victim twice and noting statement regarding inference in *Cavazos* "improperly focuse[d] on whether the evidence was sufficient to prove an element of the greater crime."). The dissent also states that evidence Kral did not state in his report that appellant broke the needle is evidence meant to discredit Kral's testimony as to the greater offense, and as such, is not enough to support the lesser-included **[**18]** offense; however, this is not the only evidence supporting the lesser-included offense. Along with the affirmative evidence that appellant fell to the ground with the syringe in his hand, Kral's affirmative testimony that he did not know the condition of the needle prior to appellant's fall and that he could not determine whether appellant's falling to the ground after being thrown caused the needle to break off is some evidence that appellant did not successfully alter or destroy the syringe by breaking the needle from the barrel.

With respect to concealment of the syringe, although there was ample evidence of appellant's attempt to shove the syringe under the seat and defendant admitted, "that was the intention," there was also evidence that the syringe was never fully concealed, and as such, the attempt to conceal the syringe by shoving it under the seat was never completed. Consequently, we conclude there was more than a scintilla of evidence that appellant had "specific intent to commit an offense[, and executed] an act amounting to more than mere preparation that tend[ed] but fail[ed] to effect **[*12]** the commission of the offense intended." *Tex. Penal Code Ann. § 15.01(a)*; *see Bullock, 509 S.W.3d at 925*. Any breakage, concealment, or alteration **[**19]** following the struggle was incidental to the struggle and at least arguably involuntary as to appellant.

The State cites *Burks v. State, No. PD-0992-15, 2016 Tex. Crim. App. Unpub. LEXIS 1127, 2016 WL 6519139, at *6-7 (Tex. Crim. App. Nov. 2, 2016)* (mem. op., not designated for publication); *Carnley v. State, 366 S.W.3d 830, 834-35 (Tex. App.—*

Fort Worth 2012, pet. ref'd); and *Ramos v. State, 351 S.W.3d 913, 914-15 (Tex. App.—Amarillo 2011, pet. ref'd)*, in support of its argument that appellant altered the syringe by moving its location. Each of these cases involves the sufficiency of the evidence on a tampering conviction; none involves the trial court's denial of an appellant's request for a lesser-included instruction. These cases are inapposite to review of the denial of appellant's request for a lesser-included instruction because the standard in sufficiency cases conflicts with the standard we apply here. *See Ritcherson, 568 S.W.3d at 676* ("The court of appeals . . . appears to have applied legal-sufficiency law instead of lesser-included-offense law. In that respect the court of appeals erred."). When reviewing sufficiency, we review evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*; *see Brooks v. State, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010)*. When reviewing the denial of a lesser-included instruction, we consider whether there is more than a scintilla of evidence to entitle **[**20]** a defendant to a lesser charge; we do not consider whether the evidence supports the verdict on the greater charge. *See Sweed, 351 S.W.3d at 68*.

Moreover, we do not agree with the premise underlying the State's argument, that moving evidence constitutes alteration in every instance. "Alter" is not defined by the statute, *see Tex. Penal Code Ann. § 37.09*, and jurors are free to interpret undefined statutory language to have "any meaning which is acceptable in common parlance." *State v. Bolles, 541 S.W.3d 128, 138 (Tex. Crim. App. 2017)* (quoting *Kirsch v. State, 357 S.W.3d 645, 650 (Tex. Crim. App. 2012)*); *see Code Construction Act*, *Tex. Gov't Code Ann. § 311.011(a)* ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."). Merriam-Webster defines alter as "to make different without changing into something else." *Alter*, MERRIAM-WEBSTER ONLINE DICTIONARY, available at https://www.merriam-webster.com/dictionary/alter (last visited July 8, 2019). Dictionary.com defines alter as "to make different in some particular, as size, style, course, or the like; modify." *Alter*, DICTIONARY.COM, available at https://www.dictionary.com/browse/alter (last visited July 8, 2019). The jury charge in this case did not define "alter" or make any reference to evidence being moved. *See Arteaga v. State, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017)* ("If a word or a phrase is not defined, the trial court may nonetheless **[**21]** define them in the charge if they have an established legal or technical meaning."). The jury could have reasonably concluded the syringe, although moved, was not altered.

Burks, *Carnley*, and *Ramos* do not require otherwise. Again, none of these cases involved a defendant's request for a lesser-included instruction. Instead, each of these cases involved a challenge to the sufficiency of the evidence on a tampering conviction. **[*13]** *See generally Burks, 2016 Tex.*

Crim. App. Unpub. LEXIS 1127, 2016 WL 6519139; *Carnley, 366 S.W.3d 830*; *Ramos, 351 S.W.3d 913*. So the court in each of these cases reviewed the evidence in the light most favorable to the verdict to determine whether "any rational trier of fact could have found" the evidence was altered. *See Burks, 2016 Tex. Crim. App. Unpub. LEXIS 1127, 2016 WL 6519139, at *5*; *Carnley, 366 S.W.3d at 833*; *Ramos, 351 S.W.3d at 915*. And in *Burks*, *Carnley*, and *Ramos*, the courts did determine that movement of the evidence (a car, a corpse, and a corpse, respectively) constituted sufficient evidence that the evidence was altered. *Burks, 2016 Tex. Crim. App. Unpub. LEXIS 1127, 2016 WL 6519139, at *6-7*; *Carnley, 366 S.W.3d at 835-36*; *Ramos, 351 S.W.3d at 915*. The *Ramos* court noted the plain meaning of alter as, "to change or make different" and stated that it did not "see any reason why the act of physically manipulating potential evidence of a crime should not be encompassed with that definition." *Ramos, 351 S.W.3d at 915*.

We agree that in many instances, movement of evidence may constitute sufficient evidence that evidence **[**22]** has been altered. We do not agree that movement of evidence conclusively proves alteration of evidence, particularly when, as here, the evidence is not to be reviewed in the light most favorable to the verdict. Consequently, we conclude the evidence in this case was susceptible to different interpretations regarding whether appellant altered evidence.[5] The jury could have rationally believed that appellant was guilty of attempted tampering and not tampering. The trial court erred in denying the request for a charge on the lesser-included offense of attempted tampering with evidence.

Having found error in the trial court's denial of the requested instruction on the lesser-included offense, we must determine whether that error requires reversal. ***HN7***[] The erroneous refusal to give a requested instruction on a lesser-included offense is charge error subject to an *Almanza* harm analysis. *Sweed, 351 S.W.3d at 69-70*; *see Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)*. Under *Almanza*, when jury-charge error has been preserved, as it was in this case, we will reverse if the error in the court's charge resulted in some harm to the accused. *Ngo v. State, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005)*; *see Almanza, 686 S.W.2d at 171*.

HN8[] "[T]he harm from denying a lesser offense instruction stems from the potential to place the jury in the dilemma **[**23]** of convicting for a greater offense in which the jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer." *Masterson v. State, 155 S.W.3d 167, 171*

[5] Although we do not rely on sufficiency cases in reviewing the denial of a lesser-included instruction because of the significantly different standard of review, we nonetheless note that even in a recent sufficiency case, one appellate court determined movement was not sufficient to support the conclusion that evidence has been altered. In *Stahmann v. State*, the Thirteenth Court of Appeals determined that the evidence to support alteration was insufficient where the defendant tossed a prescription bottle out of his car and over a fence. *548 S.W.3d 46, 54-55 (Tex. App.—Corpus Christi-Edinburg 2018, pet. granted)*. The Court of Criminal Appeals granted the State's petition for discretionary review in that case, heard argument on March 6, 2019, and the case remains pending before the Court of Criminal Appeals.

(Tex. Crim. App. 2005). Ordinarily, if the absence of a charge on the lesser-included offense left the jury with the sole option either to convict the defendant of the charged offense or to acquit him, some harm exists. *Saunders v. State, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995)*.

Citing *Masterson*, the State contends there was no harm in this case because the **[*14]** jury was not left with the sole option to convict or acquit appellant because appellant had "admitted to and was convicted by the jury of possession" so "the jurors would know he would not be released from liability *even if they acquitted him* of tampering." In *Masterson* (and *Saunders*), the Court of Criminal Appeals held that the jury's failure to find an intervening lesser-included offense (one between the requested lesser offense and the offense charged) may, in appropriate circumstances, render a failure to submit the requested lesser offense harmless." *Masterson, 155 S.W.3d at 171* (citing *Saunders, 913 S.W.2d at 572*). This case does not involve an intervening lesser-included offense, and we decline to extend the holdings of *Masterson* and *Saunders* to offenses which are not lesser-included offenses. **[**24]** While it may make sense for a jury to consider "[t]he intervening lesser offense [a]s an available compromise, giving the jury the ability to hold the wrongdoer accountable without having to find him guilty of the charged (greater) offense," *see Masterson, 155 S.W.3d at 171*, a guilty finding on a separate offense with entirely different elements is not an appropriate "compromise." It would not be logical or lawful for a jury, believing appellant guilty of attempted tampering rather than tampering, to find him guilty of possession as an alternative to finding him guilty of tampering.

Without a charge on the lesser-included offense of attempted tampering with evidence, the jury only had the option to either convict appellant of the tampering offense or acquit him on the charge. In this situation, some harm exists, particularly when one considers that the maximum imprisonment for attempted tampering with evidence in this case would have been 20 years, *see Tex. Penal Code Ann. §§ 12.33, 12.425, 15.01(d), 37.09(c)*, whereas Appellant received a life sentence arising from his felony conviction for tampering with evidence enhanced by his prior felony convictions. *See id. §§ 12.42(d), 37.09(c)*; *Bridges v. State, 389 S.W.3d 508, 512-13 (Tex. App.—Houston [14th Dist.] 2012, no pet.)* (holding that imposition of penalty that is more severe than potential maximum penalty for requested **[**25]** lesser-included offense is evidence of some harm). Accordingly, we conclude that appellant suffered some harm. We sustain appellant's second issue on appeal.

III. Conclusion

Because appellant conceded possession of a controlled substance, we affirm the trial court's judgment on appellant's possession of a controlled substance case. We reverse the trial court's judgment on tampering with physical evidence and remand the case for further proceedings. *Tex. R. App. P. 43.2(d)*.

/s/ Charles A. Spain

Justice

Panel consists of Justices Jewell, Zimmerer, and Spain. (Jewell, J., dissenting.)

Publish — *TEX. R. APP. P. 47.2(b)*.

End of Document

Affirmed in part, Reversed and Remanded in part, and Majority and Dissenting Opinions filed July 16, 2019.

In The

Fourteenth Court of Appeals

NO. 14-17-00580-CR
NO. 14-17-00581-CR

CHARLES ROBERT RANSIER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 207th District Court
Comal County, Texas
Trial Court Cause Nos. CR2016-303 & CR2017-004

D I S S E N T I N G O P I N I O N

I respectfully disagree with the majority's analysis and disposition of appellant's second issue. I would hold that the trial court did not err in refusing appellant's request for a lesser-included offense instruction on attempted tampering with physical evidence, and I would overrule appellant's second issue. Because I cannot join the majority's opinion and judgment, I dissent.

The indictments in relevant part charged appellant with:

> knowing that an investigation was pending or in progress, [appellant] did then and there alter, destroy or conceal a thing, to-wit: a syringe, with intent to impair its verity, legibility, or availability as evidence in the investigation

and,

> knowing that an offense had been committed, [appellant] did then and there alter, destroy or conceal a thing, to-wit: a syringe, with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation or official proceeding related to the offense.

See Tex. Penal Code § 37.09(a), (d-1). The trial court submitted a single question asking the jury whether it found appellant guilty or not guilty of tampering with physical evidence, and the court instructed the jury on the offense elements as set forth in the indictment and Penal Code sections 37.09(a) and (d-1). Appellant requested an instruction on the lesser-included offense of attempted tampering with physical evidence, and the trial court refused the request.[1] The jury found appellant guilty of the offense of tampering with physical evidence.

In his second issue, appellant contends the trial court erred by refusing to instruct the jury on attempted tampering with physical evidence. We review the trial court's decision on the submission of a lesser-included offense for an abuse of discretion. *See Guzman v. State*, 552 S.W.3d 936, 947 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd) (citing *Ramirez v. State*, 422 S.W.3d 898, 900 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd)). The trial court abuses its discretion when its decision is arbitrary, unreasonable, or without reference to guiding rules or principles. *Id.* (citing *Penaloza v. State*, 349 S.W.3d 709, 711 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd)). Because the trial court has no discretion in

[1] I agree with the majority that appellant preserved error.

determining the applicable law, the trial court also abuses its discretion when it fails to analyze the law correctly and apply it to the facts of the case. *Id.*

Deciding this issue involves a two-step process. *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016); *Cavazos v. State*, 382 S.W.3d 377, 384-85 (Tex. Crim. App. 2012); *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011). We first determine whether the requested instruction pertains to an offense that is a lesser-included offense of the charged offense. *Bullock*, 509 S.W.3d at 924. Generally speaking, an offense is a lesser-included offense if it consists of an attempt to commit the offense charged. Tex. Code Crim. Proc. art. 37.09(4). Applying article 37.09(4) to the present case, attempted tampering with physical evidence is a lesser-included offense of tampering with physical evidence. I agree with the majority that the first step is established as a matter of law.

The second step requires us to determine whether the evidence presented during the trial supports the requested instruction. *Bullock*, 509 S.W.3d at 924-25; *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011); *Rice*, 333 S.W.3d at 144. A defendant is entitled to an instruction on a lesser-included offense when some evidence exists that would permit a jury to rationally find that if the defendant is guilty, he is guilty *only* of the lesser-included offense. *Bullock*, 509 S.W.3d at 924-25; *Cavazos*, 382 S.W.3d at 385; *Saunders v. State*, 840 S.W.2d 390, 391-92 (Tex. Crim. App. 1992). As applied to the present case, there must be some affirmative evidence from which a rational jury could acquit appellant of tampering, but convict him of attempted tampering. *See Cavazos*, 382 S.W.3d at 385. The evidence must establish that the lesser-included offense is a valid, rational alternative to the charged offense. *Bullock*, 509 S.W.3d at 925.

In examining the core inquiry whether a jury rationally could find the defendant guilty only of the lesser-included offense, we consider all of the

evidence admitted at trial and not just the evidence presented by the defendant. *Id.*; *Goad v. State*, 354 S.W.3d 443, 446 (Tex. Crim. App. 2011). There are generally two ways in which the evidence may indicate that a defendant is guilty only of a lesser-included offense. *Bullock*, 509 S.W.3d at 925; *Sweed*, 351 S.W.3d at 68; *Saunders*, 840 S.W.2d at 391-92. First, evidence may refute or negate other evidence establishing an element or elements of the charged offense. *See Saunders*, 840 S.W.2d at 391. Second, a defendant may be shown guilty only of a lesser-included offense if the evidence is subject to different inferences. *See Bullock*, 509 S.W.3d at 925; *Saunders*, 840 S.W.2d at 392. Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge. *Sweed*, 351 S.W.3d at 68. This threshold showing is low, but it is not enough that the jury may merely disbelieve crucial evidence pertaining to the greater offense; rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted. *Id*. We may not consider the credibility of the evidence supporting the lesser charge or consider whether that evidence is controverted or conflicts with other evidence. *Bullock*, 509 S.W.3d at 925.

In considering whether a lesser offense is a valid, rational alternative to the charged offense, we compare the statutory requirements between the charged offense—here, tampering with physical evidence—and the lesser offense—here, attempted tampering with physical evidence—to determine whether evidence exists to support a conviction for attempted tampering with physical evidence but not tampering with physical evidence. *See id.* (comparing charged offense of theft against lesser offense of attempted theft); *see also Smith v. State*, 881 S.W.2d 727, 734 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (comparing charged offense of murder against lesser offense of attempted murder). As charged in the

indictment, a person commits the offense of tampering with physical evidence if either, (1) knowing that an investigation was pending or in progress, a person alters, destroys, or conceals a syringe, with intent to impair its verity, legibility, or availability as evidence in the investigation; or (2) knowing that an offense had been committed, a person alters, destroys, or conceals a syringe, with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation or official proceeding related to the offense. *See* Tex. Penal Code § 37.09(a), (d-1). Criminal attempt occurs when a person, with specific intent to commit an offense, does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended. *Id*. § 15.01(a); *Bullock*, 509 S.W.3d at 925. Thus, to find appellant guilty *only* of attempted tampering with physical evidence, a jury would be required to determine that appellant, (1) knowing that an investigation was pending or in progress, or that an offense had been committed, (2) with intent to impair the syringe's verity, legibility, or availability as evidence in the investigation, subsequent investigation, or official proceeding related to the offense, (3) did an act amounting to more than mere preparation, but failed to alter, destroy, or conceal the syringe by all means alleged. Could a jury reasonably have acquitted appellant of tampering with the syringe by all means alleged, but convicted appellant only of attempting to alter, destroy, or conceal the syringe?

Answering this question requires us to examine whether some evidence refutes or negates other evidence establishing the greater offense, or whether the evidence presented is subject to different interpretations, as to all means alleged in the indictment. *See Sweed*, 351 S.W.3d at 68; *Saunders*, 840 S.W.2d at 392. If the evidence allows of only one reasonable conclusion that appellant completed the offense of tampering with the syringe by at least one of the means alleged—

altering, destroying, or concealing—then a jury rationally could not find him guilty only of attempted tampering with physical evidence. In that instance, appellant would not be entitled to an instruction on the lesser-included offense of attempted tampering with physical evidence.

The State attempted to prove appellant tampered with physical evidence by three means: (1) appellant altered or destroyed the syringe by breaking the needle from the barrel; (2) appellant concealed the syringe by hiding it in his right hand or under the driver's seat, though Trooper Kral ultimately discovered that appellant was holding the syringe; and (3) appellant altered the syringe by changing its physical location. In the trial court, both sides argued for or against all three theories in the context of appellant's directed verdict motion, the charge conference, and closing argument. On appeal, however, appellant challenges only the first two of the State's theories.[2]

Ordinarily, if even one independent ground fully supports the complained-of ruling and an appellant does not assign error to it, we accept the validity of that unchallenged independent ground and need not address the challenged grounds. *See Marsh v. State*, 343 S.W.3d 475, 479 (Tex. App.—Texarkana 2011, pet. ref'd) (applying principle to evidentiary ruling).[3] In this case, however, I conclude that

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[2] Appellant's brief does not address why the State's theory of altering-by-moving-evidence could not support the trial court's decision to refuse the lesser-included offense instruction. And appellant filed no reply brief after the State in its brief specifically asked us to affirm the judgment because appellant had not disputed that he altered the syringe by changing its location.

[3] *See Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980) (defendant must challenge each ground on which the trial court relies on to rule against the defendant because one sufficient ground supports trial court's order). In non-precedential dispositions, courts have applied the same rule in other contexts. *State v. Hoskins*, No. 05-13-00416-CR, 2014 WL 4090129, at *2 (Tex. App.—Dallas Aug. 19, 2014, no pet.) (not designated for publication) (applying principle to issue regarding motion for new trial); *see also Johnson v. State*, Nos. 03-15-00695-CR, 03-15-00696-CR, 2017 WL 1404334, at *4 (Tex. App.—Austin

the trial court's ruling is supported under the State's first theory and that appellant was not entitled to a lesser-included offense instruction. That determination is dispositive of appellant's second issue.

Under its first theory, the State attempted to prove tampering with physical evidence by showing that appellant altered or destroyed the syringe by breaking it. For appellant to be entitled to the requested instruction on the lesser-included offense, there must be at least a scintilla of affirmative evidence from which a jury rationally could find that (1) appellant did *not* complete the charged offense, that is, he did not alter or destroy the syringe by breaking it, and (2) appellant is guilty only of an attempt to do so.

Trooper Kral testified that after he realized appellant was holding a syringe in his right hand, he saw appellant "basically grab[] [the syringe] like this and with his thumb he was actively trying to break it" and shove it under the seat.[4] Trooper Kral then verbally commanded appellant to drop the syringe and move away from the truck. Appellant did not comply after numerous commands. As appellant continued his efforts to break the syringe and shove it under the seat, Trooper Kral grabbed appellant by the shoulder and forcibly removed him from the truck. Appellant landed on the ground, and Trooper Kral saw that appellant still held the syringe and was "trying to throw it off to the side." The syringe landed about two feet away. Trooper Kral recovered the syringe and saw that the needle was broken. After describing these events, Trooper Kral testified that appellant altered the syringe by breaking it. As Trooper Kral explained, "I can tell you he was actively trying to break it because that's what happened to the syringe itself." Trooper Kral

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Apr. 12, 2017, no pet.) (mem. op., not designated for publication) (applying principle to issue regarding motion to suppress).

[4] Trooper Kral explained more specifically that appellant's thumb was "touching the needle side" of the syringe.

also testified that appellant "was successful in breaking" the needle.[5] After appellant was arrested, he acknowledged during his recorded statement that he was trying to "break the syringe" or "get rid of it."

Appellant makes three arguments in support of his point that some evidence exists to permit a rational jury to find that he did not break the syringe but only attempted to do so. First, appellant posits that the syringe might not have been intact before Trooper Kral arrived on the scene. The only trial testimony on this point was Trooper Kral's statements that he had no knowledge of the syringe's condition prior to seeing it in appellant's hand, and that he could not see the syringe's "full condition" while appellant held it. But that is not affirmative evidence that the syringe was not intact before the encounter. *See Cavazos*, 382 S.W.3d at 385. Neither appellant nor any other witness testified that the syringe was broken before Trooper Kral first arrived, and no circumstantial evidence reasonably suggests it was not intact at that time. Further, no evidence refutes or negates Trooper Kral's testimony describing appellant's efforts to break the syringe. Nor does any evidence negate appellant's admission that he was trying to break the syringe during the encounter. Appellant simply could not have placed his thumb on the needle as described by Trooper Kral if the needle in fact was not attached. Moreover, appellant's actions to break the syringe, his "desperate" demeanor, and the traces of methamphetamine recovered from the syringe, all give rise to a reasonable inference that appellant had recently used the syringe to inject methamphetamine. He could not have used the syringe for that purpose if the needle was not attached. And even assuming the syringe was broken before Trooper Kral initiated contact, the only reasonable inference from the evidence is that the syringe was broken by appellant and no one else.

[5] During his testimony, Trooper Kral sometimes referred to the "syringe" and the "needle" interchangeably.

Second, appellant observes that Trooper Kral neither stated in his offense report that appellant broke the syringe, nor photographed or recovered the needle. However, the court admitted the syringe into evidence and the needle was broken. That Trooper Kral did not recover the needle is not evidence that appellant did not break the needle. *See Hampton v. State*, 109 S.W.3d 437, 441 (Tex. Crim. App. 2003) (failure to locate knife does not mean knife was not used in the offense), *abrogated on other grounds by Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2011). Likewise, that Trooper Kral's report does not state that appellant broke the needle is also insufficient. In cross-examining Trooper Kral based on his report, appellant's counsel clearly intended to discredit Trooper Kral's testimony that appellant broke the needle by establishing that Trooper Kral did not expressly state that fact in the report. But this was an effort to convince the jury merely to disbelieve Trooper Kral, and it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. *Bullock*, 509 S.W.3d at 925; *Sweed*, 351 S.W.3d at 68. If the report said that appellant did *not* break the needle, then I would agree that a scintilla of affirmative evidence is present supporting the lesser-included offense.

Third, appellant argues that it is possible the jury could have determined that the force of appellant being thrown from his vehicle "could have caused the needle to break off from the syringe." According to appellant, Trooper Kral "conceded that it was possible that the act of forcibly throwing Mr. Ransier to the ground could have caused a needle to detach from the syringe." To the contrary, Trooper Kral did not concede that fact; appellant's counsel suggested the possibility by his question and Trooper Kral said he could not determine whether it was possible. We credit evidence from any source, *Sweed*, 351 S.W.3d at 69, but attorney questions are not evidence. *See Madden v. State*, 242 S.W.3d 504, 513-14 & n.23

(Tex. Crim. App. 2007) (recognizing that the questions posed by the attorney are not evidence); *Haley v. State*, 396 S.W.3d 756, 767 (Tex. App.—Houston [14th Dist.] 2013, no pet.). There exists no affirmative evidence from which a jury rationally could find that Trooper Kral's actions, as opposed to appellant's actions, broke the syringe.

Given the totality of the record, I see no evidence from which a jury rationally could find that appellant is not guilty of tampering with physical evidence by breaking the syringe and thus altering or destroying it as charged, but is guilty only of an attempt to do so.[6] Appellant's contrary arguments are grounded on speculation, not on evidence or reasonable inferences from the evidence. *See Cavazos*, 382 S.W.3d at 385 (meeting second step requires "more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense."). To show he was entitled to an instruction on attempted tampering, at least a scintilla of affirmative evidence must have permitted the jury to rationally determine that appellant was guilty of committing only an attempt to break the syringe. *See id*. The only way a jury rationally could find that the needle broke for reasons other than appellant's intentional efforts is if the jury rejected Trooper Kral's testimony, which is tantamount to merely "disbeliev[ing] crucial evidence pertaining to the greater offense." *Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994). Similarly, the evidence is not susceptible to different interpretations on whether appellant merely attempted but failed to break the syringe. Other than speculation,

[6] Appellant also contends that the syringe was not "destroyed" because it retained evidentiary value, as reflected by the undisputed fact that the state recovered methamphetamine from the broken syringe. I disagree with appellant on this point. In my view, the syringe was destroyed because it was "rendered useless" as a syringe. *See Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014) (physical evidence is "destroyed" when "ruined or rendered useless," even if it retains evidentiary value); *Williams v. State*, 270 S.W.3d 140, 146-47 (Tex. Crim. App. 2008).

there is no evidence directly germane to the lesser offense and from which a jury rationally could find that the needle broke by means other than as a result of appellant's intentional efforts to break it.

Accordingly, I conclude there exists no evidence that appellant, if guilty, is guilty only of attempting to alter or destroy the syringe. Therefore, the trial court did not err in refusing appellant's request for a jury instruction on the lesser-included offense of attempted tampering with physical evidence. *See Smith*, 881 S.W.2d at 734 (court did not err in refusing instruction on attempted murder).

For these reasons, I would overrule appellant's second issue. As a result of my conclusion, I do not address appellant's remaining arguments under his second issue.

/s/ Kevin Jewell
Justice

Panel consists of Justices Jewell, Zimmerer, and Spain. (Spain, J., majority).

Publish — Tex. R. App. P. 47.2(b).

Ransier v. State

Court of Appeals of Texas, Fourteenth District, Houston

October 24, 2019, Filed

NO. 14-17-00580-CR, NO. 14-17-00581-CR

Reporter
2019 Tex. App. LEXIS 9360 *; 2019 WL 5444386

CHARLES ROBERT RANSIER, Appellant v. THE STATE OF TEXAS, Appellee

Notice: Publish — *TEX. R. APP. P. 47.2(b).*

Prior History: [*1] On Appeal from the 207th District Court, Comal County, Texas. Trial Court Cause No. CR2016-303 & CR2017-004.

Ransier v. State, 2019 Tex. App. LEXIS 6021 (Tex. App. Houston 14th Dist., July 16, 2019)

Core Terms

tampering, syringe, cases, concurrent cause, lesser-included, convict, needle, broke

Case Summary

Overview

HOLDINGS: [1]-A rational jury could have inferred that the syringe was broken by defendant's fall, and any breakage following the struggle was incidental to the struggle and arguably involuntary as to defendant; [2]-A jury also could have rationally inferred that the trooper did not know how, when, or if defendant broke the syringe from the fact that the trooper could not determine whether defendant's falling to the ground caused the needle to break off; [3]-A jury could conclude defendant was guilty of attempted tampering if it found defendant had the specific intent to break the syringe but failed to do so.

Outcome

Motion dismissed.

LexisNexis® Headnotes

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN1[⬇] **Accessories, Aiding & Abetting**

To convict appellant of tampering under the law of parties, the jury had to determine that appellant was criminally responsible for the acts of another, *Tex. Penal Code Ann. § 7.01(a)*. A person is criminally responsible for an offense committed by another if acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense, *Tex. Penal Code Ann. § 7.02(a)(1)*.

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > Actus Reus

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Evidence Tampering > Elements

HN2[⬇] **Acts & Mental States, Actus Reus**

To convict appellant of tampering based on the existence of a concurrent cause, two possible combinations exist to satisfy the "but for" causation requirement: (1) the defendant's conduct may be sufficient by itself to have caused the harm, regardless of the existence of a concurrent cause; or (2) the defendant's conduct and the other cause together may be sufficient to have caused the harm. But if the concurrent cause is clearly sufficient, by itself, to produce the result and the defendant's conduct, by itself, is clearly insufficient, then the defendant cannot be convicted. Concurrent cause is for the jury to decide.

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Evidence Tampering > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN3[⬇] **Evidence Tampering, Elements**

Tampering with evidence requires specific intent.

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Evidence Tampering > Elements

HN4[⬇] **Evidence Tampering, Elements**

And unlike criminal negligence or involuntary manslaughter, attempted tampering does not require a lesser culpable mental state.

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Evidence Tampering > Elements

HN5[] **Evidence Tampering, Elements**

The Court of Criminal Appeals reviews tampering cases in a much different manner than murder cases. Recent Court of Criminal Appeals cases addressing sufficiency challenges to tampering convictions have held the convictions were not supported by the evidence.

Counsel: For APPELLEE: Amanda Erwin, SAN MARCOS, TX.

For STATE: Joshua Presley, Sammy M. McCrary, NEW BRAUNFELS, TX; Stacey M. Soule, AUSTIN, TX.

Judges: Panel consists of Justices Jewell, Zimmerer, and Spain. (Jewell, J., dissenting.).

Opinion by: Charles A. Spain

Opinion

SUPPLEMENTAL MAJORITY OPINION ON REHEARING

The State filed a motion for rehearing in which it contends that even if Trooper Kral broke the needle, appellant is criminally responsible under the law of the parties, *Penal Code sections 7.01* and *7.02*, or as a "but for" or concurrent cause under *Penal Code section 6.04*. The State also filed a substantially similar motion for en banc reconsideration. The State contends, "The majority did not consider that principles of causation in the Texas Penal Code—and case law based on those provisions—precluded Appellant from demonstrating that he was 'guilty only' of an *attempt* to break the needle."

In appellate cause no. 14-17-00580-CR, appellant's tampering case, the court grants rehearing and issues this supplemental opinion to clarify its original opinion, but the court denies the State's requested relief.[1] The court dismisses the State's motion for en banc reconsideration as moot without prejudice to filing a motion for en banc reconsideration in light of this supplemental opinion.

In appellate **[*2]** cause no. 14-17-00581-CR, appellant's possession case, on its own motion, the court dismisses the motion for rehearing and the motion for en banc reconsideration as moot because the State does not seek any relief in this case.

HN1[] To convict appellant of tampering under the law of parties, the jury had to determine that appellant was criminally responsible for the acts of another. *Tex. Penal Code Ann. § 7.01(a)*. Relevant here, a person is criminally responsible for an offense committed by another if "acting

[1] Justice Jewell dissents without opinion to the denial of relief on rehearing.

with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense." *Id. at § 7.02(a)(1)*.

HN2[⬆] To convict appellant of tampering based on the existence of a concurrent cause, two possible combinations exist to satisfy the "but for" causation requirement: (1) the defendant's conduct may be sufficient by itself to have caused the harm, regardless of the existence of a concurrent cause; or (2) the defendant's conduct and the other cause together may be sufficient to have caused the harm. *Robbins v. State, 717 S.W.2d 348, 351 (Tex. Crim. App. 1986)*. But if the concurrent cause is clearly sufficient, by itself, to produce the result and the defendant's conduct, by itself, is clearly insufficient, **[*3]** then the defendant cannot be convicted. *Id.* Concurrent cause is for the jury to decide. *Wooten v. State, 267 S.W.3d 289, 295 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd)*.

Nowhere in the majority opinion did we conclude that Kral broke the needle. We recited the facts that Kral grabbed appellant by the shoulder and forced him out of the truck, and appellant fell to the ground. We also explained that on the ground, appellant still held the syringe, but tried to throw it aside. The syringe landed about two feet from appellant. Kral testified that he could not determine whether appellant's falling to the ground after Kral threw him to the ground caused the needle to break off. We concluded a rational jury could have inferred that the syringe was broken by the fall. We stated that any breakage following the struggle was incidental to the struggle and at least arguably involuntary as to appellant.

HN3[⬆] Tampering with evidence requires specific intent. *Rabb v. State, 483 S.W.3d 16, 21 (Tex. Crim. App. 2016)*; *Thornton v. State, 425 S.W.3d 289, 300 n.59 (Tex. Crim. App. 2014)*. The intent must accompany the action. *Rabb, 483 S.W.3d at 21*; *Thornton, 425 S.W.3d at 300 n.59*. Many of the cases the State cites in support of its causation arguments are sufficiency cases, but we do not apply sufficiency standards to our analysis. *See Ritcherson v. State, 568 S.W.3d 667, 676 (Tex. Crim. App. 2018)*. Perhaps a rational jury could have concluded appellant acted with the kind of culpability required for tampering and at the **[*4]** same time appellant caused Kral to pull him out of the truck, resulting in a fall which broke the syringe. However, a rational jury may have also reasonably inferred the opposite conclusion: that although appellant had specific intent to break the syringe before Kral pulled him out of appellant's truck, Kral's pulling him out of the truck and onto the ground disrupted appellant's commission of the offense. *See Goad v. State, 354 S.W.3d 443, 449 (Tex. Crim. App. 2011)* ("[E]ven if one could not logically deduce from this evidence that Goad must have lacked intent to commit theft, that is not the proper standard of our analysis."). Although a jury could have rationally concluded that appellant's conduct and the fall together caused the syringe to break, a jury could have also rationally concluded that the fall itself broke the syringe and appellant's efforts to break the

syringe failed. A jury also could have rationally inferred that Kral did not know how, when, or if appellant broke the syringe from the fact that Kral could not determine whether appellant's falling to the ground caused the needle to break off.

The other cases cited by the State are also distinguishable. *Miers v. State* was not a case involving tampering, attempted tampering, **[*5]** or a request for a jury instruction on a lesser-included offense. *157 Tex. Crim. 572, 251 S.W.2d 404 (Tex. Crim. App. 1952)*. Miers was convicted of murder. *Id. at 405*. At trial, he argued that the deceased had accidentally shot himself during a scuffle after wresting the gun from Miers who had entered a filling station to commit robbery. *Id. at 407*. On appeal, Miers complained that the trial court did not include in the charge the defense that Miers did not fire the shot that killed the deceased. *Id.* The Court of Criminal Appeals held that the trial court did not err and this was no defense because Miers set in motion the cause which occasioned the death of deceased. *Id. at 408*.

The only case the State cited involving a denied request for a charge on a lesser-included offense, *Dowden v. State, 758 S.W.2d 264 (Tex. Crim. App. 1988)*, is cited by the State for its analysis of Dowden's separate sufficiency challenge. However, the court's analysis of the charge issue is also distinguishable. The evidence in *Dowden* showed that Dowden took guns to a police station at 4:00 a.m. in the morning to help his brother escape from jail. *Id. at 267*. Dowden pointed an automatic pistol at police officers and declared, "I have come to get Charles." *Id.* An exchange of gunfire ensued between Dowden and officers, and one officer accidentally shot the police **[*6]** captain. *Id. at 267-68*. Dowden was convicted of the murder of the captain. *Id. at 266*. On appeal, Dowden complained that the trial court refused to charge the jury on the lesser-included offenses of aggravated assault, criminally negligent homicide, and involuntary manslaughter. *Id. at 268*. The Court of Criminal Appeals concluded there was no evidence that appellant was guilty of the lesser included offenses. *Id. at 268-72*. The court explained the lesser-included offenses required evidence of a lesser culpable mental state—that Dowden failed to perceive the risk surrounding his conduct. *Id. at 269-72*. The court held that Dowden was not entitled to charges on the lesser-included offenses because none of the evidence indicated appellant was not aware of the risk involved in entering a police station with a loaded gun. *Id. at 269*. "The resulting death would not have occurred but for appellant's intentional conduct." *Id.* The court emphasized that the actions of Dowden were all voluntary and there was no evidence that appellant was acting merely recklessly or with criminal negligence. *Id. at 271*.

Unlike *Miers* or *Dowden*, in which the defendants were or should have been aware that their actions created a substantial risk that someone might be injured or killed, appellant **[*7]** may not have anticipated that Kral's attempt to stop him from breaking the syringe would cause the syringe to break.***HN4***[⬆] And unlike criminal negligence or involuntary manslaughter,

attempted tampering does not require a lesser culpable mental state. A jury could conclude appellant was guilty of attempted tampering if it found appellant had the specific intent to break the syringe but failed to do so. *Tex. Penal Code Ann. § 15.01(a)*.

Moreover, ***HN5***[⬆] the Court of Criminal Appeals reviews tampering cases in a much different manner than murder cases. Recent Court of Criminal Appeals cases addressing sufficiency challenges to tampering convictions have held the convictions were not supported by the evidence. *See Rabb, 483 S.W.3d at 22-24* (evidence insufficient to prove tampering by swallowing baggie of drugs but sufficient to prove attempted tampering); *Thornton, 425 S.W.3d at 293-94, 303-07* (dropping crack pipe was insufficient to prove tampering, but sufficient to prove attempted tampering); *Rabb v. State, 434 S.W.3d 613, 617-18 (Tex. Crim. App. 2014)* (swallowing plastic bag was insufficient to prove destroying evidence, case remanded for consideration of attempted tampering).

For all these reasons, the State's causation arguments do not preclude us from concluding that more than a scintilla of evidence exists from which a jury could conclude appellant **[*8]** was "guilty only" of attempted tampering. The remainder of the State's arguments on rehearing were adequately addressed by the majority's opinion, and we do not address them here. The State's requested relief on rehearing is denied.

/s/ Charles A. Spain

Justice

Panel consists of Justices Jewell, Zimmerer, and Spain. (Jewell, J., dissenting.)

Publish — *TEX. R. APP. P. 47.2(b)*.

End of Document

Tex. Penal Code § 6.04

This document is current through the 2019 Regular Session, 86th Legislature, and 2019 election results.

Texas Statutes & Codes Annotated by LexisNexis® > Penal Code > Title 2 General Principles of Criminal Responsibility (Chs. 6 — 9) > Chapter 6 Culpability Generally (§§ 6.01 — 6.04)

Sec. 6.04. Causation: Conduct and Results.

(a) A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

(b) A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:

(1) a different offense was committed; or

(2) a different person or property was injured, harmed, or otherwise affected.

History

Enacted by Acts 1973, 63rd Leg., ch. 399 (S.B. 34), § 1, effective January 1, 1974; am. Acts 1993, 73rd Leg., ch. 900 (S.B. 1067), § *1.01*, effective September 1, 1994.

End of Document

Tex. Penal Code § 7.01

This document is current through the 2019 Regular Session, 86th Legislature, and 2019 election results.

Texas Statutes & Codes Annotated by LexisNexis® > Penal Code > Title 2 General Principles of Criminal Responsibility (Chs. 6 — 9) > Chapter 7 Criminal Responsibility for Conduct of Another (Subchs. A — B) > Subchapter A Complicity (§§ 7.01 — 7.20)

Sec. 7.01. Parties to Offenses.

(a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

(b) Each party to an offense may be charged with commission of the offense.

(c) All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice.

History

Enacted by Acts 1973, 63rd Leg., ch. 399 (S.B. 34), § 1, effective January 1, 1974; am. Acts 1993, 73rd Leg., ch. 900 (S.B. 1067), § *1.01*, effective September 1, 1994.

End of Document

Tex. Penal Code § 7.02, Part 1 of 2

This document is current through the 2019 Regular Session, 86th Legislature, and 2019 election results.

Texas Statutes & Codes Annotated by LexisNexis® > Penal Code > Title 2 General Principles of Criminal Responsibility (Chs. 6 — 9) > Chapter 7 Criminal Responsibility for Conduct of Another (Subchs. A — B) > Subchapter A Complicity (§§ 7.01 — 7.20)

Sec. 7.02. Criminal Responsibility for Conduct of Another.

(a) A person is criminally responsible for an offense committed by the conduct of another if:

(1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;

(2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or

(3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.

(b) If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

History

Enacted by Acts 1973, 63rd Leg., ch. 399 (S.B. 34), § 1, effective January 1, 1974; am. Acts 1993, 73rd Leg., ch. 900 (S.B. 1067), § *1.01*, effective September 1, 1994.

End of Document

Tex. Penal Code § 37.09

This document is current through the 2019 Regular Session, 86th Legislature, and 2019 election results.

Texas Statutes & Codes Annotated by LexisNexis® > Penal Code > Title 8 Offenses Against Public Administration (Chs. 36 — 39) > Chapter 37 Perjury and Other Falsification (§§ 37.01 — 37.14)

Sec. 37.09. Tampering with or Fabricating Physical Evidence.

(a) A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he:

(1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or

(2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.

(b) This section shall not apply if the record, document, or thing concealed is privileged or is the work product of the parties to the investigation or official proceeding.

(c) An offense under Subsection (a) or Subsection (d)(1) is a felony of the third degree, unless the thing altered, destroyed, or concealed is a human corpse, in which case the offense is a felony of the second degree. An offense under Subsection (d)(2) is a Class A misdemeanor.

(c-1) It is a defense to prosecution under Subsection (a) or (d)(1) that the record, document, or thing was visual material prohibited under Section 43.261 that was destroyed as described by Subsection (f)(3)(B) of that section.

(d) A person commits an offense if the person:

(1) knowing that an offense has been committed, alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense; or

(2) observes a human corpse under circumstances in which a reasonable person would believe that an offense had been committed, knows or reasonably should know that a law enforcement agency is not aware of the existence of or location of the corpse, and fails to report the existence of and location of the corpse to a law enforcement agency.

(e) In this section, “human corpse” has the meaning assigned by Section 42.08.

History

Enacted by Acts 1973, 63rd Leg., ch. 399 (S.B. 34), § 1, effective January 1, 1974; am. Acts 1991, 72nd Leg., ch. 565 (S.B. 4), § *4*, effective September 1, 1991; am. Acts 1993, 73rd Leg., ch. 900 (S.B. 1067), § *1.01*, effective September 1, 1994; am. Acts 1997, 75th Leg., ch. 1284 (S.B. 160), § *1*, effective September 1, 1997; am. Acts 2007, 80th Leg., ch. 287 (H.B. 872), § *1*, effective September 1, 2007; am. Acts 2011, 82nd Leg., ch. 1322 (S.B. 407), § *1*, effective September 1, 2011.

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Thompson v. State

Court of Criminal Appeals of Texas

June 27, 2007, Delivered

NO. PD-0044-06

Reporter
236 S.W.3d 787 *; 2007 Tex. Crim. App. LEXIS 871 **

JOSHUA THOMPSON, Appellant v. THE STATE OF TEXAS

Notice: PUBLISH

Subsequent History: Rehearing denied by *In re Thompson, 2007 Tex. Crim. App. LEXIS 1534 (Tex. Crim. App., Oct. 31, 2007)*

Prior History: [1]** ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS. TRAVIS COUNTY.

Thompson v. State, 183 S.W.3d 787, 2005 Tex. App. LEXIS 10213 (Tex. App. Austin, 2005)

Core Terms

penal code, felony, transferred intent, mistake of fact, offenses, mistake of fact defense, provisions, culpable mental state, culpability, murder, serious bodily injury, ignorance, negate, criminally responsible, mistaken belief, lesser, statutory language, knowingly, commission of the offense, injury to a child, intentionally, transferred, intending, element of an offense, different offense, charged offense, actual result, accidental, aggravated, desired

Case Summary

Procedural Posture

Defendant was charged with first-degree felony of injury to a child and the second-degree felony of aggravated assault, pursuant to *Tex. Penal Code Ann. § 22.04(a)*, and *Tex. Penal Code Ann. § 22.02(a)*, respectively. The Third Court of Appeals, Travis County, Texas, affirmed the trial court's judgment of conviction. Defendant appealed.

Overview

Defendant had allegedly taken a tree branch and beaten a child, who was a student in defendant's Bible study class. The offenses with which defendant was charged consisted of: (1) intentionally or knowingly causing serious bodily injury, a first-degree felony; and (2) intentionally or knowingly causing bodily injury, a third-degree felony. The issue presented was the scope of the law of transferred intent under *Tex. Penal Code Ann. § 6.04(b)(1)*. That section could be used under certain circumstances to transfer intent from a lesser offense to a greater offense, even when those offenses were contained within the same penal code section. The most important caveat to this rule was that a defendant subject to this type of transferred intent instruction was entitled, upon request, to a mistake of fact instruction. The trial court's transferred intent instruction was not erroneous in this case. Moreover, defendant failed to request the mistake of fact defense; consequently, the issue was not preserved. Although the holding in this case regarding the mistake of fact defense constituted a new proposition of law, that did not relieve appellant of the obligation to preserve such a claim.

Outcome

The judgment of the intermediate appellate court was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN1[] **Mens Rea, General Intent**

See *Tex. Penal Code Ann. § 6.04(b)(1)*.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Transferred Intent

Criminal Law & Procedure > Defenses > Ignorance & Mistake of Fact

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Theory of Defense

Criminal Law & Procedure > Trials > Jury Instructions > Requests to Charge

HN2[] **Mens Rea, General Intent**

A provision in *Tex. Penal Code Ann. § 6.04(b)(1)* can be used under certain circumstances to transfer intent from a lesser offense to a greater offense, even when those offenses are contained within the same penal code section. That conclusion comes with caveats. Perhaps the most important caveat is that a defendant subject to this type of transferred intent instruction is entitled (upon request) to a mistake of fact instruction.

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > General Overview

HN3 **Aggravated Offenses, Elements**

See *Tex. Penal Code Ann. § 22.04(a)*.

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > General Overview

HN4 **Aggravated Offenses, Elements**

See *Tex. Penal Code Ann. § 22.02(a)*.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Transferred Intent

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN5 **Mens Rea, General Intent**

The transferred intent statute could be used to transfer a defendant's culpable mental state from a lesser offense to one that carries a greater penalty.

Governments > Courts > Judicial Precedent

HN6 **Courts, Judicial Precedent**

The doctrine of stare decisis indicates a preference for maintaining consistency with past decisions, especially those that interpret statutory enactments.

Governments > Legislation > Interpretation

HN7 **Legislation, Interpretation**

In cases of statutory construction, an appellate court gives effect to the plain meaning of the statutory text, unless the language is ambiguous or the plain meaning leads to absurd consequences that the legislature could not possibly have intended.

In such event, an appellate court may resort to extratextual factors.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN8[] **Mens Rea, General Intent**

See *Tex. Penal Code Ann. § 6.04*.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Transferred Intent

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN9[] **Mens Rea, General Intent**

Two observations are made about the statutory language of *Tex. Penal Code Ann. § 6.04*. First, *Tex. Penal Code Ann. § 6.04(b)* is worded to discount the significance of certain types of differences. That is, the subsection makes the difference legally irrelevant, at least for causation purposes. Second, the statute contains two "transferred intent" provisions that use parallel language. They both turn on the "only difference" being a particular type of fact. In *Tex. Penal Code Ann. § 6.04(b)(1)*, that different fact is a different offense while, in *Tex. Penal Code Ann. § 6.04(b)(2)*, that different fact is a different victim or object of the crime.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Transferred Intent

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN10[] **Mens Rea, General Intent**

Transfer from a higher culpable mental state to a lower one can be permitted because, by statute, proof of a higher degree of culpability than that charged constitutes proof of the culpability charged. *Tex. Penal Code Ann. § 6.02(e)*.

Criminal Law & Procedure > Defenses > Ignorance & Mistake of Fact

HN11[] **Defenses, Ignorance & Mistake of Fact**

See *Tex. Penal Code Ann. § 8.02*.

Criminal Law & Procedure > ... > Acts

& Mental States > Mens Rea > General Intent

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Transferred Intent

Criminal Law & Procedure > Defenses > Ignorance & Mistake of Fact

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN12[] **Mens Rea, General Intent**

The history of *Tex. Penal Code Ann. § 6.04(b)(1)* and *Tex. Penal Code Ann. § 8.02* reveals that the law of transferred intent with respect to offenses has been entwined with the law of mistake. Given that history, it seems probable that the legislature has intended, in its enactment of the current Penal Code, that these two aspects of the law go hand-in-hand.

Criminal Law & Procedure > Criminal Offenses > Lesser Included Offenses > Crimes Against Persons

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Transferred Intent

Criminal Law & Procedure > Defenses > Ignorance & Mistake of Fact

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Theory of Defense

HN13[] **Lesser Included Offenses, Crimes Against Persons**

Tex. Penal Code Ann. § 6.04(b)(1) does indeed authorize the transfer of a culpable mental state between offenses contained in the same statute and also between greater and lesser included offenses. That authorization may be overridden by language defining a particular offense, as in the offense of capital murder, but no such impediment arises with respect to an injury-to-a-child offense. Where *§ 6.04(b)(1)* permits the transfer of a culpable mental state, mistake of fact may be raised as a defense. The mistake must be reasonable for it to constitute a circumstance that exculpates a defendant of the offense charged, and of course, a defendant would still be guilty of any lesser included offense that would be applicable if the facts were as a defendant believed. *Honea v. State, 585 S.W.2d 681 (Tex. Crim. App. 1979)* is overruled to the limited extent that it holds that a defendant is not entitled to a mistake-of-fact instruction.

Counsel: For APPELLANT: Terrence W. Kirk, Austin, TX.

For STATE: Carl Bryan Case, Jr., ASSISTANT DISTRICT ATTORNEY, Austin, TX.

Judges: KELLER, P.J., delivered the opinion of the Court in which MEYERS, KEASLER, HERVEY, HOLCOMB, and COCHRAN, JJ., joined. WOMACK, J., filed a concurring opinion. PRICE and JOHNSON, JJ., concurred.

Opinion by: KELLER

Opinion

[*788] In this case we consider the scope of one of the more difficult penal code provisions, **[*789]** which deals with one variant of the law of "transferred intent" in Texas. *Texas Penal Code § 6.04(b)(1)* provides:

> *HN1*[⬆] A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . a different offense was committed.

We conclude that *HN2*[⬆] the provision can be used under certain circumstances to transfer intent from a lesser offense to a greater offense, even when those offenses are contained within the same penal code section. That conclusion comes with caveats, which we will discuss below. Perhaps the most important caveat is that a defendant subject to this type of transferred intent instruction is entitled (upon request) to a mistake of fact instruction. Finding that the trial court's "transferred **[**2]** intent" instruction was not erroneous, we affirm the judgments of the courts below.

I. BACKGROUND

A. The Incident

Appellant was an associate pastor at a Baptist church. His twin brother, Caleb Thompson, was also active in the church. The victim was an eleven-year-old boy who attended a children's Bible-study program at the church. On July 3, 2002, the victim's Bible-study teacher reported to appellant that the child was misbehaving. Appellant drove the child to Caleb's nearby residence. At some point, Caleb joined them. Appellant beat the child with a tree branch. He struck the victim more than 100 times during a period estimated by the child at one-and-a-half hours. During at least part of that time, Caleb helped hold the child down. As a result of the beating, the victim's back was one huge bruise from his neck to his buttocks. A paramedic testified that it was the worst bruising he had ever seen. The victim's blood pressure was low, his heart rate was fast, and he appeared to be undergoing hypovolemic shock, which is an indication that he was losing blood. A doctor testified that the bruising was severe and palpable, indicative of deep tissue

bruising, and that the victim's urine was **[**3]** "coca-cola colored," indicating collection in the kidneys of a substance called myoglobin, which is released into the blood as a result of the death of muscle cells. The doctor further testified that, as a result of this condition, the child would have died from renal failure if he had not received prompt medical attention.

B. Trial

The injury to a child offenses at issue here are:

> (1) intentionally or knowingly causing serious bodily injury, a first-degree felony, and
>
> (2) intentionally or knowingly causing bodily injury, a third-degree felony. [1]

Appellant was charged with the first-degree felony of injury to a child and the second-degree felony of aggravated assault. [2] Appellant's jury charge contained **[*790]** instructions that tracked **[**4]** the language of the charged offenses, along with allegations necessary to support a deadly weapon finding. [3]

The charge also contained two sets of instructions, to which appellant objected, that applied the doctrine of "transferred intent" found in *Texas Penal Code § 6.04(b)(1)*. First, the charge contained an abstract **[**5]** instruction tracking the language of that provision. Second, with respect to the injury to a child offense, the charge contained an application paragraph that permitted the jury to find appellant guilty of the first-degree felony if he merely intended to cause *bodily injury*, so long as he actually caused *serious bodily injury*:

> Now, bearing in mind the foregoing instructions, if you believe from the evidence, beyond a reasonable doubt that the defendant . . . intending to cause bodily injury to [L.G.], a child 14 years of age or younger, by striking [L.G.] with a stick, branch, or an object unknown to the Grand Jury, did then and there cause serious bodily injury to [L.G.], a child 14 years of age or younger, by striking [L.G.] with a stick, branch or object unknown to the Grand Jury, and [the defendant] did then and there use or exhibit a deadly weapon, to wit: a stick, a branch, or an object unknown to the Grand Jury, during the commission of this offense, in that the manner of its use or intended use was capable of causing death or serious

---

[1] *TEX. PEN. CODE § 22.04(a)*(***HN3***[↑]) "A person commits an offense if he intentionally [or] knowingly . . . by act . . . causes to a child . . . (1) serious bodily injury . . . or (3) bodily injury."), *(e)-(f)*(offense classifications); *see also § 1.07(a)(46)*("'Serious bodily injury' means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ").

[2] *TEX. PEN. CODE § 22.02(a)*(***HN4***[↑]) "A person commits an offense if the person commits assault as defined in *§ 22.01* and the person: (1) causes serious bodily injury to another . . . or (2) uses or exhibits a deadly weapon during the commission of the assault."); *§ 22.01(a)*("A person commits an offense if the person: (1) intentionally [or] knowingly . . . causes bodily injury to another . . . [or] (2) intentionally or knowingly threatens another with imminent bodily injury . . . ."); *§ 22.02(b)*(second degree offense); *see also § 1.07(a)(46)*.

[3] An abstract paragraph charged all the theories of aggravated assault and the underlying offense of assault set out in the previous footnote, but the application paragraph charged only the combination of *§ 22.01(a)(1)* and *§ 22.02(a)(2)*: intentionally or knowingly causing of bodily injury combined with the use or exhibition of a deadly weapon.

> bodily injury, then you will find the defendant . . . guilty as alleged in Count I . . . .

Appellant was convicted of both offenses and sentenced **[**6]** to confinement for twenty-six years for the offense of injury to a child and for twenty years for the offense of aggravated assault.

C. Appeal

On appeal, appellant contended that the jury charge improperly allowed the jury to elevate the third-degree offense of injury to a child (intentionally or knowingly causing *bodily injury*) to the first-degree offense of injury to a child (intentionally or knowingly causing *serious bodily injury*). The State agreed that the "transferred intent" instructions should not have been given but argued that the error was harmless. The court of appeals, however, relying primarily upon *Honea v. State*, [4] held that no error occurred. [5] After addressing the arguments of both parties, the court of appeals held that "appellant's intent to cause bodily injury to L.G. 'transferred' to the serious bodily injury that actually resulted from appellant's conduct." [6]

D. Discretionary Review

Appellant contends that *Honea* was wrongly decided, and he criticizes the opinion for failing to seriously analyze the issue. He complains that a literal application of *§ 6.04(b)(1)* **[**7]** would result in an extraordinarily broad expansion of criminal liability that the legislature could not possibly have intended.

[*791] The State has modified its position somewhat from the position taken before the court of appeals. The State now concludes that *§ 6.04(b)(1)* applies only when the offense intended and the offense committed appear in different statutory sections. The State also suggests the *Blockburger* [7] "same elements" test as a possible alternative method of determining whether the offenses are different.

In addition, the State contends that two other factors may limit the scope of the statute in a way that avoids any unnecessarily harsh effect. First, relying upon language in *§§ 6.04* and *6.03*, the State suggests that a lesser culpable mental state cannot be transferred to a greater mental state. For instance, a defendant who acted only with the culpable mental state of "recklessness" could never be penalized for a crime that required knowledge or specific intent. Second, the State contends that the statute imposes a foreseeability requirement. Although the State acknowledges that *§ 6.04(b)(1)* contains no explicit language **[**8]** to that effect, it believes that we could read into the statute an implicit requirement that the offense committed be "reasonably foreseeable."

II. ANALYSIS

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[4] *585 S.W.2d 681 (Tex. Crim. App. 1979)*.

[5] *Thompson v. State, 183 S.W.3d 787, 791 (Tex. App.-Austin 2005)*.

[6] *Id.*

[7] *Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)*.

A. Precedent

In *Honea*, we construed *§ 6.04(b)(1)*. [8] The defendant in that case bound and gagged the victim in a barn and stole $ 1,200 from his shirt pocket. [9] As a result of lying bound and gagged on the barn floor, the victim inhaled dust, which caused him to cough, vomit, and eventually suffocate. [10] The defendant contended that there was a fatal variance between the allegations in the aggravated robbery indictment and the proof at trial because he did not intentionally and knowingly cause serious bodily injury. [11] Relying upon *§ 6.04*, this Court held that, because the defendant clearly intended to rob the victim and his acts resulted in the offense of aggravated robbery, his intent to rob transferred to the aggravated robbery. [12] In arriving at this conclusion, the Court also cited former Article 42 (a predecessor to *§ 6.04(b)*) and two cases that construed that statute. [13]

The defendant also complained of the trial court's denial of his request for a mistake **[**9]** of fact instruction. [14] Paraphrasing the predecessor statute, the Court summarily held that "no mistake of fact issue was raised." [15]

Honea stands contrary to the propositions advanced by appellant and some of the propositions advanced by the State. Obviously, the Court held that ***HN5***[⬆] the transferred intent statute could be used to transfer a defendant's culpable mental state from a lesser offense to one that carries a greater penalty. Indeed, the transfer in that case occurred between offenses that would be considered greater and lesser-included offenses under the *Blockburger* test. Also, *Honea* did not mention any implied foreseeability requirement.

[*792] In addressing appellant's contention that *Honea* was wrongly decided, we turn to principles of statutory construction. In doing so, we keep in mind that ***HN6***[⬆] the "doctrine of *stare decisis* indicates a preference for maintaining consistency" with past decisions, especially those that interpret statutory enactments. [16]

B. Statutory Construction

1. *General Principles*

HN7[⬆] In cases of statutory construction, we give effect to the plain meaning of the statutory text, unless the language **[**10]** is ambiguous or the plain meaning leads to absurd consequences that the Legislature could not possibly have intended. [17] In such event, we may resort to extratextual factors.

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[8] *585 S.W.2d at 684-85*.

[9] *Id. at 684*.

[10] *Id.*

[11] *Id. at 684-685*.

[12] *Id. at 685*.

[13] *Id.*

[14] *Id. at 687*.

[15] *Id.*

[16] *Busby v. State, 990 S.W.2d 263, 267 (Tex. Crim. App. 1999)*.

[17] *Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)*.

[18]

Honea was decided before *Boykin*, however, and appears to have relied to some degree on the predecessor statute. So, even without a finding of ambiguity or absurd results, an examination of extratextual sources may give insight into the validity of *Honea*'s holdings. [19]

2. *Statutory Language*

With these principles in mind, we begin with the statutory language. *Texas Penal Code § 6.04* provides, in its entirety:

> ***HN8***[↑] (a) A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.
>
> (b) A person is nevertheless criminally responsible for causing **[**11]** a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:
>
> (1) a different offense was committed; or
>
> (2) a different person or property was injured, harmed, or otherwise affected.

While the present case involves the construction of subsection *(b)(1)*, the remainder of the statute provides some useful context from which to determine the meaning of that subsection. ***HN9***[↑] We make two observations about the statutory language. First, *subsection (b)* is worded to *discount the significance* of certain types of differences. That is, the subsection makes the difference legally irrelevant, at least for causation purposes. Second, the statute contains two "transferred intent" provisions that use parallel language. They both turn on the "only difference" being a particular type of fact. In *subsection (b)(1)*, that different fact is a different offense while, in subsection *(b)(2)*, that different fact is a different victim or object of the crime.

Appellant appears to concede that his desired interpretation finds no support in the language of subsection *(b)(1)*, but he argues that adherence to the literal text leads to absurd results. On the other hand, **[**12]** the State's proposed limitation of the statute's applicability to offenses with the same mental state is consistent with the language of the statute and is inherent in the notion that the defendant's culpable **[*793]** mental state transfers. [20] But we do not agree that the State's other proposed limitations follow from the statutory language.

As for the State's proposed foreseeability requirement, the language of the statute does not support such a requirement at all,

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[18] *TEX. GOVT. CODE § 311.023*.

[19] *Bawcom v. State, 78 S.W.3d 360, 363-65 (Tex. Crim. App. 2002)*(that a decision was poorly reasoned is a factor that can be considered in determining whether to overrule precedent).

[20] ***HN10***[↑] Transfer from a higher culpable mental state to a lower one would be permitted because, by statute, "[p]roof of a higher degree of culpability than that charged constitutes proof of the culpability charged." *TEX. PEN. CODE § 6.02(e)*.

even by implication. That fact becomes clear when one considers the effect of applying the State's reasoning to "different persons" under the parallel provision codified by subsection *(b)(2)*. The phrase "the only difference . . . is that . . . a different person . . . was injured" plainly does not require the State to prove that injury to a third person was reasonably foreseeable. Substituting the word "offense" for "person" should not yield a different result.

The State reads the language "different **[**13]** offenses" as creating a double-jeopardy-like relationship issue, which means that whether offenses are "different" depends upon their relationship to each other. But "different offenses" could be understood, on a more basic level, to mean different legal theories upon which a conviction could be procured, regardless of how those legal theories might be related to each other. [21] Under the double-jeopardy-type analysis, greater and lesser-included offenses would not be "different." But under the more basic approach, even a lesser-included offense would be a "different" offense from the offense charged. This latter, more basic, understanding would seem most consistent with the structure of the statute. It seems a little odd to say that a provision whose purpose is to discount the significance of an offense being "different" would attribute significance to the fact that the offense is not so different after all. But a "same statute" or "same elements" test would do just that: the perpetrator could not escape responsibility on the ground that the offense committed is "different" from the one intended but could do so on the ground that the two offenses are really the "same."

HN11[⬆] Although the parties have not raised an issue with respect to the mistake of fact defense found in *Texas Penal Code § 8.02*, consideration of that section is necessary to our interpretation of *§ 6.04(b)(1)*. The mistake of fact defense provides:

> (a) It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.
>
> (b) Although an actor's mistake of fact may constitute a defense to the offense charged, he may nevertheless be convicted of any lesser included offense of which he would be guilty if the fact were as he believed. [22]

In this case, a mistake of fact regarding the seriousness of L.G.'s injury would seem to negate the charged mental state of intent to cause serious bodily injury. Because appellant intended to commit bodily injury, which is also an offense, the intentional culpable mental state would "transfer" to the serious bodily injury actually committed, but he would have a defense, so long as his mistaken belief about the type of injury he was inflicting was *reasonable*. Of course, he would still **[**15]** be guilty of the lesser-included offense of intending to cause

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[21] *See* *Johnson v. State, 982 S.W.2d 403, 407-08 (Tex. Crim. App. 1998)*(Keller, J., **[**14]** concurring).

[22] *TEX. PEN. CODE § 8.02*.

bodily injury.

[*794] So, a plain meaning construction of the relevant statutes seems to support *Honea*'s interpretation of the transferred intent provision but appears to conflict with its related holding that the mistake of fact defense is inapplicable.

3. *Extratextual Sources*

Before the enactment of the current Penal Code in 1973, Texas was governed by the Penal Code of 1948, which contained the precursors to the statutory provisions at issue today. A defense of mistake of fact [23] and three "mistake" provisions that imputed liability from one offense to another [24] were codified within the same chapter in immediate succession. An understanding of the development of the law on mistake of fact is critical to an understanding of the law on transferred intent.

The 1948 mistake of fact defense provided:

> If a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal he is guilty of no offense, but the mistake of fact which will excuse must be such that the person so acting under a mistake would have been excusable had **[**16]** his conjecture as to the fact been correct, *and it must also be such mistake as does not arise from a want of proper care on the part of the person so acting.* [25]

Three important observations can be made about this defense. First, the mistake did not have to negate the culpable mental state required for the offense; all that had to be shown was that no offense would have been committed if the mistaken belief had been correct. Second, the defense contained a requirement that the mistake "not arise from a want of proper care," which is roughly equivalent to the current statutory requirement that the defendant's mistaken belief be "reasonable." Third, the defense did not specify that a mistake could result in liability for a lesser-included offense; rather, the statutory language suggested that the defense applied only when the mistake would completely exonerate the defendant of any offense.

The culpability and reasonableness aspects of the defense (the first two observations made about the statute) were discussed by the Court in *Green v. State*. [26] In that case, the defendant was charged with stealing hogs. [27] The jury was instructed on the defense of mistake **[**17]** of fact, with the instruction tracking the statutory language. [28] The defendant contended that the "proper care" language did not apply in a theft prosecution when the mistake was that he believed he owned the property, and he argued that the language placed a greater burden on the defense than required by law. [29] This Court agreed, holding that a finding of proper care was not required when intent

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[23] TEX. PEN. CODE, Art. 41 (1948).

[24] TEX. PEN. CODE, Arts. 42-44 (1948).

[25] Art. 41 (emphasis added).

[26] ***153 Tex. Crim. 442, 221 S.W.2d 612 (1949)***(opinion on rehearing).

[27] ***Id. at 445, 221 S.W.2d at 614***.

[28] *Id.*

[29] ***Id. at 445-46, 221 S.W.2d at 614***.

was an element of the offense and the mistake negated that intent. [30] Some of the authority quoted by the court indicated that the mistake of fact defense applied only "to acts 'otherwise criminal,' or acts in themselves criminal if unexcused" such as the selling of liquor without a license or the commission of a homicide under a mistaken belief that **[*795]** would excuse the act. [31] "In order that no confusion may arise," the Court emphasized that the rule that the jury should not be instructed on the "proper care" element of mistake of fact applied "only to those crimes where the unlawful intent is an essential element without which the offense does not arise." [32]

Our third observation about the mistake of fact statute - that it applied only when the mistake would completely exonerate the defendant of any offense - is further borne out by the three "mistake" provisions, mentioned earlier, that immediately followed the mistake of fact defense:

> Art. 42. Act done by mistake of felony. One intending to commit a felony and who in the act of preparing for or executing the same shall through mistake or accident do another act which, if voluntarily done, would be a felony, shall receive the punishment affixed to the felony actually committed.
>
> Art. 43. Act done by mistake a misdemeanor. One intending to commit a felony and who in the act of preparing for or executing the same shall through mistake or accident do another act which, if voluntarily done would be a misdemeanor, shall receive the highest punishment affixed to such misdemeanor.
>
> Art. 44. Felony done by mistake. One intending to commit a misdemeanor and who in the act of preparing for or executing the same shall through mistake commit a felony shall receive the lowest punishment affixed to the felony. [33]

These provisions **[**19]** did not mention any culpable mental state lower than "intent." Aside from that, however, the language of Article 42 was broad, imposing punishment for the "felony actually committed" regardless of whether that felony carried greater punishment than the felony intended. Indeed, at the time, that provision was the basis for the felony-murder doctrine. [34] Under Article 42, intent was "transferred" from an intended, but lesser, felony (such as robbery or injury to a child) to murder, an unintended, but greater, felony. [35] The remaining two provisions transferred intent between a felony and a misdemeanor, and vice versa, and carried a kind of proportionality limitation. All of this is contrary to the way that appellant wants us to construe the current transferred intent statute.

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[30] ***Id. at 446-49, 221 S.W.2d at 614-16***.

[31] ***Id. at 446, 221 S.W.2d at 615*** **[**18]** (quoting *Bray v. State, 41 Tex. 203 (1874)*).

[32] ***Id. at 449, 221 S.W.2d at 616***.

[33] TEX. PEN. CODE, Arts. 42-44 (1948).

[34] *Hilliard v. State, 513 S.W.2d 28, 31-2 (Tex. Crim. App. 1974)*(murder from committing injury to a child); ***Smith v. State, 154 Tex. Crim. 234, 236-37, 225 S.W.2d 846, 848 (1949)***(robbery).

[35] *Hilliard, 513 S.W.2d at 33*.

In 1962, the American Law Institute issued its official draft of the Model Penal Code, which became highly influential throughout the United States, including in **[**20]** Texas. Under the heading of causation, the Model Penal Code set forth its proposed law of transferred intent in § 2.03:

> (2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:
>
> > (a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or property is injured or affected or that the injury or harm designed or contemplated would have **[*796]** been more serious or more extensive than that caused; or
> >
> > (b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.
>
> (3) When recklessly or negligently causing a particular result is an element of an offense, the element is only established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:
>
> > (a) the actual result differs from the probable result only in the respect that a different **[**21]** person or property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
> >
> > (b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense. [36]

The Model Penal Code thus recognized that all culpable mental states were subject to being transferred, and it contained "different person or property" provisions similar to the ones in the current Texas Penal Code. But § 2.03 contained no provision transferring culpability between *offenses*. It did contain a provision extending liability to "the same kind of injury" so long as that injury was not "too remote or accidental" to have a "just bearing" on the actor's liability or the gravity of the offense. But the Model Penal Code contained another provision that more explicitly addressed liability for the commission of an unintended offense. That provision was found in the section titled "Ignorance or Mistake," § 2.04:

> (1) Ignorance or mistake as to a matter of fact or law is a defense if:
>
> > (a) the ignorance or mistake negatives **[**22]** the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense;

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[36] MODEL PENAL CODE AND COMMENTARIES ("MPC"), Pt. I., § 2.03(2) & (3), pp. 253-54 (1985)(bracketed material in original).

> (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.
> * * *
>
> (2) *Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed.* In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed. [37]

The Model Penal Code's mistake defense contained no requirement that the mistake be "reasonable." Indeed, the explanatory note indicated that the mistake "defense" was simply an application of the general principles of culpability inherent in any offense containing a culpable mental state:

> The matter is conceived as a function of the culpability otherwise **[**23]** required for commission of the offense. Such ignorance or mistake is a defense to the extent that it negatives a required level **[*797]** of culpability or establishes a state of mind that the law provides as a defense. The effect of this section therefore turns upon the culpability level for each element of the offense, established according to its definition and the general principles set forth in Section 2.02. [38]

The Model Penal Code commentary viewed "mistake of fact" as being a mere evidentiary issue:

> In other words, ignorance or mistake has only evidential import; it is significant whenever it is logically relevant, and it may be logically relevant to negate the required mode of culpability or to establish a special defense. [39]

In his treatise on criminal law defenses, Robinson explains: " § 2.04(1) does not provide a general mistake defense but simply states the obvious: If a culpable state of mind is required by an offense definition and cannot be proven because of the defendant's ignorance or mistake, then the defendant cannot be convicted of the offense." [40]

The Model Penal Code § 2.04(2) exception to the defense was based on the idea that "the defendant should not go free, for on either view - the facts as they occurred or as the defendant believed them to be - a criminal offense was committed." [41] Given the relationship in the Model Penal Code between mistake of fact and the elements of an offense, the § 2.04(2) exception to that "defense" was essentially an affirmative imputation of criminal liability. Robinson called it the "doctrine of substituted mental elements" and observed that the doctrine is broad enough to swallow completely the transferred intent provisions of Model Penal

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[37] MPC, § 2.04(1)(a) & (2), p. 267 (emphasis added).

[38] MPC, § 2.04, Explanatory Note, p. 268.

[39] MPC, § 2.04, Comment 1, p. 269.

[40] Paul H. Robinson, CRIMINAL LAW DEFENSES, Vol. 1, Ch. **[**24]** 3, § 62(d), p. 262 (1984).

[41] MPC, § 2.04, Comment 2, p. 272.

Code § 2.03. [42]

In 1970, the Texas State Bar Committee on Revision of the Penal Code submitted a proposed draft of what would eventually become our modern Penal Code. In many areas, the influence of the Model Penal Code was evident and included the proposed sections addressing causation and mistake of fact. The causation section contained transferred intent provisions that closely paralleled those articulated in Model Code:

> (b) If the offense requires that the actor **[**25]** intentionally or knowingly cause a result, he is criminally responsible for the result if the result that actually occurred:
>
> (1) was desired or contemplated, whether the desire or contemplation extended to natural events or the conduct of another; or
>
> (2) was desired or contemplated and occurred in a manner not too accidental, or by a means not too dependent on another's volitional act, to have a just bearing on the actor's criminal responsibility or the gravity of his offense.
>
> (c) If the offense requires that the actor recklessly or with criminal negligence cause a result, he is criminally responsible for the result if the result that actually occurred:
>
> (1) was within the risk perceived or that which should have been perceived, whether the risk extended to natural events or the conduct of another; or
>
> **[*798]** (2) was within the risk perceived or that which should have been perceived and occurred in a manner not too accidental, or by a means not too dependent on another's volitional act, to have a just bearing on the actor's criminal responsibility or the gravity of his offense.
>
> (d) An actor is nevertheless criminally responsible for causing a result if the only difference between what actually **[**26]** occurred and what he desired, contemplated, or risked is that a different person or property was injured, harmed, or otherwise affected. [43]

The drafters commented that their proposed penal code "for the most part emphatically rejected" the doctrine of "constructive or implied malice" that was then codified in Penal Code articles 42 through 44. [44] The drafters believed that the only features of the doctrine that were retained were the felony-murder rule and the portion of the transferred intent provision found in § 6.07(d). [45]

But as we now know, most of § 6.07 never became part of the Penal Code. Only subsection (d) survived to become part of the current code. Despite the changes from

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[42] Robinson, § 62(c)(5), p. 256-258.

[43] State Bar Committee on Revision of the Penal Code, TEXAS PENAL CODE: *A Proposed Revision*, Final Draft, § 6.07(b)-(d)(October 1970).

[44] *Id.*, § 6.07, p. 48 (commentary under "Transferred Intent" heading).

[45] *Id.*

the proposed code to the code that was enacted, the practice commentary to the current provision suggested that *§ 6.04(b)(1)* was unnecessary and "was apparently added out of an abundance of caution." [46] Although the practice commentary is often helpful because it was drafted by two individuals who **[**27]** were part of the Penal Code revision project, we do not find the commentary to be instructive in this instance because the language of the current statute does not reflect the revision committee's recommendations. The Legislature rejected the proposed provisions that made liability contingent upon whether an accidental occurrence had "a just bearing on the actor's criminal responsibility or the gravity of his offense." Instead, the Legislature created *§ 6.04(b)(1)*, which extended liability where the "only difference" with respect to the actor's culpability was that a "different offense was committed." This language is reminiscent of, and in fact broader than, the language found in articles 42 through 44, and is also similar to language found in MPC § 2.04(2), the "substituted mental elements" portion of the "mistake" section of the Model Penal Code.

The mistake of fact section of the 1970 proposed code also reflected the influence of the Model Penal Code, but with one important difference. Like the Model Code, the proposed code did not require that the actor's mistaken belief **[**28]** be reasonable, and the proposed code limited the mistake of fact defense to situations that negated the culpable mental state required for the offense:

> It is a defense to prosecution that the actor was honestly ignorant or mistaken about a matter of fact or law if his ignorance or mistake negated the intent, knowledge, recklessness, or criminal negligence required to establish an element of the offense charged. [47]

But the proposed code's *exception* to the defense was narrower than that prescribed by the Model Penal Code. While the Model **[*799]** Code made the defense unavailable whenever the actor's mistaken belief would have made him liable for *any* different crime (although reducing the punishment range, if it were less), the proposed code recognized only that the defendant could be "convicted of a *lesser included* offense of which he would be guilty" if the facts were as he believed. [48] The commentary to the proposed Texas provision explained that, if the defendant's mistaken belief would result in committing "an offense other than one included in the offense charged, he must be charged and tried again." [49]

The drafters of the proposed penal code viewed the mistake of fact defense as essentially redundant of the requirement that the State prove the mental element of an offense, [50] but they included the defense as a

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[46] Seth S. Searcy & James R. Patterson, V.A.P.C., § 6.04, *Practice Commentary*, p. 95 (last paragraph) (1974).

[47] State Bar Comm., *§ 8.02(a)*.

[48] *Id.*, *§ 8.02(b)*(emphasis added).

[49] *Id.*, § 8.02, p. 67 (commentary, **[**29]** last paragraph).

[50] *Id.*, p. 67 (commentary, first paragraph)("ignorance or mistake of any fact that negates the mental element would require acquittal without this section").

method of placing upon the defendant "the burden of producing evidence" so that a mistake of fact is something "the prosecution does not have to negate unless raised." [51] That view was maintained in the practice commentary to the current provision. [52] Again, we do not find the practice commentary to be instructive because the enacted statute differs significantly from the proposed version. Although the proposed version simply required that the defendant's mistake be an "honest" one, the enacted version requires that the mistaken belief be "reasonable." This requirement reflects language found in the prior version of the statute. As with the transferred intent provision, then, the mistake of fact defense appears to incorporate elements from both the Model Penal Code and the prior version of the Texas Penal Code.

HN12[⬆] The history of these two provisions reveals that the law of transferred intent with respect to offenses has been entwined with the law of mistake. Given that history, it seems probable that the Legislature intended in its enactment of the current Penal Code that these two aspects of the law go hand-in-hand. A codified, specialized example of this interaction may be found in the current Penal Code in the offense of murder. The murder statute describes three methods of committing the offense: (1) intentionally or knowingly causing the death of an individual, (2) intending to cause serious bodily and committing an act clearly dangerous to human life that causes the death of an individual, and (3) felony murder. [53] The first method is the traditional form of murder, while the third is the new (in 1974) offense of felony murder. But the second method is a straightforward application of the doctrine of the transferred intent of offenses, along with conditions that negate a mistake of fact defense. A person who "intends to commit serious bodily injury" intends thereby to commit the offense of aggravated assault. [54] By actually causing **[**31]** death, the person commits the unintended offense of murder. And committing "an act clearly dangerous to human life" negates the reasonableness requirement found in the mistake of fact defense. By contrast, the offense of *capital* murder contains what appears to be a sort of anti-transfer element: the offense specifically requires that **[*800]** a murder be committed "as defined under *Section 19.02(b)(1)*," the provision proscribing intentional and knowing murders. [55]

We also observe that applying the mistake of fact defense to the transfer of intent between offenses mitigates greatly the concern that a person could be penalized far beyond his actual culpability. At the same time, it has the salutary effect of placing some onus on the person who intends to commit a lesser offense to exercise care that

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[51] *Id.*

[52] Searcy **[**30]** & Patterson, § 8.02, p. 211 (commentary, first paragraph).

[53] *TEX. PEN. CODE § 19.02(b)*.

[54] *See TEX. PEN. CODE § 22.02(a)(1)*.

[55] *TEX. PEN. CODE § 19.03(a)*.

a greater one is not in fact committed. Our interpretation seems to be the only one that gives meaning and effect both to § 6.04(b)(1) and to § 8.02.

4. *Conclusion*

Given the plain language and the history of the provisions at issue, we conclude that ***HN13***[⬆] § 6.04(b)(1) does indeed authorize the transfer of a culpable **[**32]** mental state between offenses contained in the same statute and also between greater and lesser included offenses. That authorization may be overridden by language defining a particular offense, as in the offense of capital murder, but no such impediment arises with respect to the injury-to-a-child offense. Where § 6.04(b)(1) permits the transfer of a culpable mental state, mistake of fact may be raised as a defense. The mistake must be reasonable for it to constitute a circumstance that exculpates the defendant of the offense charged, and of course, the defendant would still be guilty of any lesser included offense that would be applicable if the facts were as the defendant believed. Given our holding, we overrule *Honea* to the limited extent that it held that a defendant is not entitled to a mistake-of-fact instruction.

C. Jury Charge

The trial court correctly submitted the law of transferred intent in the jury charge. The charge contained no instruction regarding the mistake of fact defense, but appellant failed to request its submission, and as a result, no error occurred with respect to the absence of that defensive instruction. [56] Although our holding regarding the mistake of fact **[**33]** defense constitutes a new proposition of law, that does not relieve appellant of the obligation to preserve such a claim. Even new rules that are held to be retroactive can be forfeited by a party's failure to complain at trial. [57]

We affirm the judgment of the court of appeals.

Delivered: June 27, 2007

Publish

Concur by: WOMACK

Concur

WOMACK, J., filed a concurring opinion.

I join the judgment of the Court and all but Part II. C. of its opinion, which follows a decision on error preservation in *Posey v. State, 966 S.W.2d 57, 62 (Tex. Cr. App. 1998)*, that I continue to believe was incorrect. *See id., at 66* (Womack, J., concurring).

Filed: June 27, 2007

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[56] *Posey v. State, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998)*.

[57] ***Taylor v. State, 10 S.W.3d 673, 683 (Tex. Crim. App. 2000)***.

Thompson v. State

Court of Appeals of Texas, Fifth District, Dallas

July 27, 2005, Opinion Filed

No. 05-04-00537-CR

Reporter
2005 Tex. App. LEXIS 5817 *; 2005 WL 1763051

JOEY AUTRY THOMPSON, Appellant, v. THE STATE OF TEXAS, Appellee.

Notice: [*1] PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Petition for discretionary review refused by *In re Thompson, 2006 Tex. Crim. App. LEXIS 382 (Tex. Crim. App., Feb. 15, 2006)*

Prior History: On Appeal from the 382nd Judicial District Court, Rockwall County, Texas. Trial Court Cause No. 2-03-237.

Disposition: AFFIRMED.

Core Terms

safe, extraneous, corroboration, offenses, connect, arson, trial court, burglaries, transferred intent, indictment, contends, building destruction, destroy, limits, beyond a reasonable doubt, tending, argues, commit, rented, limit instruction, alleged offense, specific intent, accomplice's testimony, cutting torch, burglarize, different offense, acetylene torch, minivan, rental, guilt

Case Summary

Procedural Posture

Defendant was convicted in the 382nd Judicial District Court, Rockwall County (Texas) of arson in violation of *Tex. Penal Code Ann. § 28.02(a)(2)(A)*, *(d)* (2003). Defendant appealed.

Overview

The indictment alleged that defendant started a fire or caused an explosion by attempting to cut into a safe with a cutting torch and setting the contents of the safe on fire. Defendant was convicted of arson and the court affirmed. Facts tended to connect defendant to the commission of the alleged offense when explained in the context of the time, place, and nature of the offense, and thus corroborated the accomplice's testimony for purposes of *Tex. Code Crim. Proc. Ann. art. 38.14* (2005). While defendant entered the building with the intent to commit one offense, he committed another offense, arson, and thus the trial court did not err in instructing the jury on transferred intent under Tex. Penal Code Ann. *§ 6.04(b)(1)* (2003), and the evidence was sufficient to support defendant's conviction in this regard. The court rejected defendant's argument that evidence of extraneous offenses was inadmissible pursuant to Tex. R. Evid. 404(b), 403. Assuming that defendant, pursuant to Tex. R. App. P. 33.1, preserved a complaint for review by objecting below, the court rejected defendant's argument that the extraneous offenses were not proven, given the State's uncontradicted evidence.

Outcome

The court affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Trials > Witnesses > Credibility

HN1[⬇] **Accessories, Aiding & Abetting**

See *Tex. Code Crim. Proc. Ann. art. 38.14* (2005).

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Trials > Witnesses > Credibility

Criminal Law & Procedure > Trials > Witnesses > Presentation

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN2[⬇] **Accessories, Aiding & Abetting**

The test for weighing the sufficiency of corroborative evidence is to eliminate from consideration the testimony of the accomplice witness and then examine the

testimony of other witnesses to ascertain if there is evidence which tends to connect the accused with the commission of the offense. It is not necessary that the corroborating evidence directly connect the defendant to the crime or that it be sufficient by itself to establish guilt; it need only tend to connect the defendant to the offense. If the combined weight of the non-accomplice evidence tends to connect the defendant to the offense, the requirement of *Tex. Code Crim. Proc. Ann. art. 38.14* (2005) has been fulfilled. Each case must be considered on its own facts and circumstances.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Elements of Offense

Evidence > Weight & Sufficiency

Criminal Law & Procedure > Trials > Burdens of Proof > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN3[⬇] **Particular Instructions, Elements of Offense**

In assessing the legal sufficiency of the evidence to support a conviction, the appellate court considers all the record evidence in the light most favorable to the jury's verdict and determines whether, based on that evidence and reasonable inferences therefrom, a rational jury could have found the accused guilty of all of the elements of the offense beyond a reasonable doubt. The legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge for the case. This hypothetical charge would set out the law, be authorized by the indictment, not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describe the particular offense for which the defendant was tried.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview

Evidence > Weight & Sufficiency

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN4[⬇] **Juries & Jurors, Province of Court & Jury**

In determining the factual sufficiency of the evidence, the appellate court views all of the evidence in a neutral light and determines whether the jury was rationally justified in finding guilt beyond a reasonable doubt. To

make this determination, the appellate court considers whether the evidence of appellant's guilt, taken alone, is too weak to support the finding of guilt beyond a reasonable doubt, that is, the verdict is clearly wrong and manifestly unjust, or the evidence contrary to the verdict is so strong that the beyond a reasonable doubt standard could not have been met. The appellate court's evaluation of the sufficiency of the evidence must not substantially intrude upon the jury's role as the sole judge of the weight and credibility of the evidence.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Elements of Offense

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN5[] **Particular Instructions, Elements of Offense**

When the trial court's charge authorizes the jury to convict on different theories, the appellate court upholds the verdict of guilty if the evidence is sufficient on any one of the theories.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Criminal Law & Procedure > Criminal Offenses > Arson > General Overview

Criminal Law & Procedure > ... > Arson > Simple Arson > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

HN6[] **Mens Rea, General Intent**

A person commits the second degree offense of arson if the person starts a fire, regardless of whether the fire continues after ignition, or causes an explosion with intent to destroy or damage any building, knowing that it is within the limits of an incorporated city or town. *Tex. Penal Code Ann. § 28.02(a)(2)(A)*, *(d)* (2003). A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. *Tex. Penal Code Ann. § 6.03(a)* (2003). A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. *Tex. Penal Code Ann. § 6.03(b)* (2003). A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that a different offense was committed. *Tex. Penal Code Ann. § 6.04(b)(1)* (2003).

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN7 **Mens Rea, General Intent**

Although *Tex. Penal Code Ann. 6.04(b)* (2003) is titled transferred intent, it is somewhat of a misnomer because the concept does not address intent or any other mens rea. Rather, it depicts an effort by the legislature to criminalize an act that resulted in a different offense than the accused intended to commit. *Section 6.04(b)* transfers the mens rea of a contemplated, but incomplete, offense to the offense actually committed by mistake or accident. The rationale is that public policy demands that persons engaged in criminal activity not be exonerated merely because they accidentally commit a different offense than originally contemplated. Therefore, the intent to commit the contemplated offense transfers to the offense in fact committed.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Use of Particular Evidence

HN8 **Mens Rea, General Intent**

The principle of transferred intent under *Tex. Penal Code Ann. § 6.04(b)(1)* (2003) may be applied in the jury charge when the evidence warrants, although not alleged in the indictment.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

HN9 **Mens Rea, General Intent**

The intent to commit the contemplated offense transfers to the offense in fact committed. The only difference between what the appellant intended and what occurred was that a different offense was committed.

Criminal Law & Procedure > ... > Arson > Simple Arson > Elements

Criminal Law & Procedure > Criminal Offenses > Arson > General Overview

Criminal Law & Procedure > ... > Arson > Simple Arson > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

HN10 **Simple Arson, Elements**

Because *Tex. Penal Code Ann. § 6.04* (2003) does not state an intent requirement, it cannot "conflict" with the intent

requirement of the arson statute.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Criminal Law & Procedure > Trials > Judicial Discretion

HN11[↓] Standards of Review, Abuse of Discretion

The admission of evidence is a matter within the discretion of the trial court. As long as the trial court's ruling was within the zone of reasonable disagreement there is no abuse of discretion, and the appellate court must uphold the trial court's ruling.

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > General Overview

HN12[↓] Pleading & Practice, Motion Practice

Tex. R. App. P. 33.1 provides that to preserve error, an appellant must present to the trial court a timely request, motion, or objection, state specific grounds, and obtain a ruling.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Trials > Witnesses > Credibility

Criminal Law & Procedure > Trials > Witnesses > Presentation

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN13[↓] Accessories, Aiding & Abetting

The corroboration requirement of *Tex. Code Crim. Proc. Ann. art. 38.14* (2005) is not a rule of admissibility of evidence. In addition, extraneous offense evidence is admissible under Tex. R. Evid. 404(b) for the purpose of corroboration under *Tex. Code Crim. Proc. Ann. art. 38.14* (2005)

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

Evidence > ... > Procedural

Matters > Preliminary
Questions > General Overview

HN14[] **Conduct Evidence, Prior Acts, Crimes & Wrongs**

Prior to the admissibility of any extraneous offense, the trial court must be satisfied that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense. Tex. R. Evid. 104(b).

Judges: Before Justices Morris, Lang, and Mazzant. Opinion By Justice Lang.

Opinion by: DOUGLAS S. LANG

Opinion

Before Justices Morris, Lang, and Mazzant

Opinion By Justice Lang

On a plea of not guilty, a jury convicted Joey Autry Thompson of arson. *See* *TEX. PEN. CODE ANN. § 28.02* (Vernon 2003). He was sentenced to eleven years' confinement. In eight issues, appellant contends: (1) the evidence fails to meet the corroboration requirement of *section 38.14 of the code of criminal procedure, see TEX. CODE CRIM. PROC. ANN. art. 38.14* (Vernon 2005); (2) the evidence is legally and factually insufficient to prove certain elements of the offense; (3) the trial court abused its discretion in admitting evidence of extraneous offenses; and (4) the trial court erred in instructing the jury on transferred intent. For the reasons below, we resolve appellant's issues **[*2]** against him and affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

The indictment alleged that appellant, on or about September 26, 2002, intentionally or knowingly, with the intent to damage or destroy a building, located at 967 Sids Road, started a fire or caused an explosion by attempting to cut into a safe with a cutting torch and setting the contents of the safe on fire, thus causing the fire to spread, knowing the building was within the limits of Rockwall, Texas, an incorporated city or town.

Todd Becker testified. He said he acted with appellant in the burglary of several businesses in Florida and Texas. Becker testified he intended to burglarize an "out of the way" place, and appellant suggested Potter Concrete. Becker said he was advised by appellant that appellant had been a sales representative for an equipment company and had called on Potter Concrete, located at 967 Sids Road, Rockwall, in the summer of 2002. Appellant told Becker he saw a safe there and thought it might have money in it. Appellant knew it was a gun safe and thought there might be ammunition in it. Becker and appellant "scouted the place out" one afternoon in the fall of **[*3]** 2002.

About one week later, Becker and appellant drove to Potter Concrete at night, in a minivan that appellant had rented, which was used to hold equipment. When they arrived, according to Becker, they cut the telephone and alarm lines, and waited about thirty minutes to see if there would be a police response. Becker then pried open one of the back doors, but quickly determined he had broken into the adjoining business by mistake. After breaking into Potter Concrete, he located the safe. Because the safe was too big to remove, they used an acetylene torch to cut into it in an attempt to open the safe. However, they had only made holes in the safe door when they saw that some of the papers in the bottom of the safe had caught fire. They threw a glass of water inside, but because they heard sounds like ammunition exploding, they left.

Becker testified, over appellant's objections and subject to a limiting instruction, that appellant was involved in burglarizing the safes of several businesses in Florida in June 2002, and the safe of a check cashing business in Midland, Texas, in October 2002. According to Becker, in those burglaries, he and appellant rented a van, disabled telephone **[*4]** lines and surveillance cameras, waited thirty minutes to assure the burglar alarms had not engaged, entered the buildings, removed the safes, opened them at other locations, and took the contents. Becker testified that appellant bought an acetylene torch in June 2002, after they returned from Florida, and Becker reimbursed him for it. As to the Midland burglary, Becker testified that they used a cutting torch to remove the safe from the floor and left burn marks on the floor.

Mike Potter, president of Potter Concrete, testified that appellant made a business call at Potter Concrete in the summer of 2002. According to Potter, the gun safe could be seen from the reception area. Potter testified Potter Concrete was in the Rockwall city limits, but was located in a "pretty undeveloped" area.

Ariana Adair, assistant fire marshal for the city of Rockwall, testified that she was called to the scene of a fire at Potter Concrete about 2:30 a.m. on September 26, 2002. The interior of the building was destroyed. Telephone communication wires into the building had been cut, and two rear entry doors had been pried open. Adair determined that the fire started in a safe. Tests showed that no combustible **[*5]** or flammable liquids were used, which was consistent with the use of a torch. In addition, Adair testified that the "cutting on the safe" was consistent with the use of a torch.

The State presented a rental record from Dollar Rent A Car in Dallas showing that appellant rented a minivan on September 18, 2002, and returned it on September 26, 2002, at 11:30 p.m. The State also presented appellant's credit card account from Lowe's showing that he bought "torch kits and accessories" on June 19, 2002.

The State presented other witnesses who testified to the Florida and Midland burglaries, also over appellant's objections and subject to a limiting instruction. Appellant did not testify.

The jury charge included instructions that Becker was an accomplice and the law of transferred intent, tracking *section 6.04(b) of the penal code*. The application part of the charge included two paragraphs, one which authorized conviction for arson if the jury found that appellant

> intentionally or knowingly, with the intent to damage or destroy a building, located at 967 Sids Road, started a fire, or caused an explosion, by attempting to cut into a safe with a cutting torch and setting [the] **[*6]** contents of [the] safe on fire, thus causing the fire to spread, knowing the said building was within the limits of an incorporated city or town, namely Rockwall, Texas, ...

The other paragraph authorized conviction for arson if the jury found that appellant

> intending to cut into a safe with a cutting torch, caused a fire which damaged or destroyed a building . . ., knowing that said building was within the limits of an incorporated city or town, namely Rockwall, Texas, ...

II. CORROBORATION OF ACCOMPLICE'S TESTIMONY

In issues one and two, appellant contends that the testimony of the accomplice, Becker, was not corroborated by evidence tending to connect appellant with the indicted offense. Specifically, appellant argues that evidence presented by the State's other witnesses was either too weak and tenuous to connect appellant to the crime or tended to connect appellant only to other, extraneous offenses.

A. Applicable Law

HN1[⬆] "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient it if merely shows **[*7]** the commission of the offense." *TEX. CODE CRIM. PROC. ANN. art. 38.14* (Vernon 2005). ***HN2***[⬆] The test for weighing the sufficiency of corroborative evidence is to eliminate from consideration the testimony of the accomplice witness and then examine the testimony of other witnesses to ascertain if there is evidence which tends to connect the accused with the commission of the offense. *Reed v. State, 744 S.W.2d 112, 125 (Tex. Crim. App. 1988)*. It is not necessary that the corroborating evidence directly connect the defendant to the crime or that it be sufficient by itself to establish guilt; it need only tend to connect the defendant to the offense. *Cathey v. State, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999)*. If the combined weight of the non-accomplice evidence tends to connect the defendant to the offense, the requirement of *article 38.14* has been fulfilled. *Id.* (citing *Gosch v. State, 829 S.W.2d 775, 777 (Tex. Crim. App. 1991))*. Each case must be considered on its own facts and circumstances. *Reed, 744 S.W.2d at 126*.

B. Discussion

The facts show: (1) appellant visited Potter **[*8]** Concrete on business in the summer of 2002, shortly before the alleged offense, and was thus aware of its "out of

the way" location in an undeveloped area and that a safe was present; (2) appellant bought an acetylene torch on June 19, 2002, within a short time before the alleged offense on September 26, 2002; and (3) appellant rented a minivan, returning it at to a Dallas rental car agency at 11:30 p.m. on September 26, 2002, within twenty-four hours of the alleged offense. These facts tend to connect appellant to the commission of the alleged offense when explained in the context of the time, place, and nature of the alleged offense, and, as such, corroborate Becker's testimony that Potter Concrete was in an "out of the way place" and that an acetylene torch and a minivan, which could carry equipment and a safe, if necessary, were used to commit the alleged offense. On the facts and circumstances of this case, we conclude there is some non-accomplice testimony which tends to connect appellant to the commission of the alleged offense. *See* *Cathey, 992 S.W.2d at 462*; *Reed, 744 S.W.2d at 125*. Accordingly, we conclude that the requirement of *article 38.14* **[*9]** has been met, and we resolve appellant's first and second issues against him.

III. SUFFICIENCY OF THE EVIDENCE

In issues three through six, appellant challenges the legal and factual sufficiency of the evidence supporting specific elements of the offense.

A. Standard of Review and Applicable Law

HN3[⬆] In assessing the legal sufficiency of the evidence to support a conviction, we consider all the record evidence in the light most favorable to the jury's verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational jury could have found the accused guilty of all of the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 318-19, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)*; *Swearingen v. State, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003)*. The legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge for the case. *Malik v. State, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)*. This hypothetical charge would set out the law, be authorized by the indictment, not unnecessarily increase the State's burden of proof or **[*10]** unnecessarily restrict the State's theories of liability, and adequately describe the particular offense for which the defendant was tried. *Id.*

HN4[⬆] In determining the factual sufficiency of the evidence, we view all of the evidence in a neutral light and determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Zuniga v. State, 144 S.W.3d 477, 484 (Tex. Crim. App. 2004)*. To make this determination, we consider whether the evidence of appellant's guilt, taken alone, is too weak to support the finding of guilt beyond a reasonable doubt, that is, the verdict is clearly wrong and manifestly unjust, or the evidence contrary to the verdict is so strong that the beyond-a-reasonable-doubt standard could not have been met. *Id. at 484-85*; *Ross v. State, 133*

S.W.3d 618, 620 (Tex. Crim. App. 2004). Our evaluation of the sufficiency of the evidence must not substantially intrude upon the jury's role as the sole judge of the weight and credibility of the evidence. Johnson v. State, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000).

HN5[] When, as in this case, the trial court's charge authorized the jury to **[*11]** convict on different theories, we uphold the verdict of guilty if the evidence is sufficient on any one of the theories. Rabbani v. State, 847 S.W.2d 555, 558-59 (Tex. Crim. App. 1992).

HN6[] A person commits the second degree offense of arson if the person starts a fire, regardless of whether the fire continues after ignition, or causes an explosion with intent to destroy or damage any building, knowing that it is within the limits of an incorporated city or town. TEX. PEN. CODE ANN. § 28.02(a)(2)(A), (d) (Vernon 2003). A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. *Id.* § 6.03(a) (Vernon 2003). A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. *Id.* § 6.03(b) (Vernon 2003). A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, **[*12]** or risked is that a different offense was committed. *Id.* § 6.04(b)(1) (Vernon 2003).

B. Discussion

1. Knowledge of the Location of the Offense

In issues three and four, appellant contends the evidence is insufficient to prove that he knew that the location of the offense was within the incorporated limits of the city of Rockwall. There was evidence that a large sign next to the entrance of Potter Cement gave the address as "967 Sids Road, *Rockwall Tx.*" (Emphasis added). Moreover, there was testimony that Potter Concrete was a customer of appellant's employer, appellant called on Potter Concrete purposefully to discuss business, and appellant's business associate, Russell Kelly, knew that Potter Concrete was located within the Rockwall city limits. It is a reasonable inference from this evidence that appellant, in his business pursuits, knew that the building was located within the Rockwall city limits. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that appellant knew that the location of the offense was within the incorporated limits of the city of Rockwall. *See* Jackson, 443 U.S. at 318-19. **[*13]** We resolve appellant's third issue against him.

Appellant argues that there was evidence that the building was located in an undeveloped area and there were no signs in

the vicinity that one was entering the "City of Rockwall." However, the jury is the sole judge of the weight and credibility of the evidence. *See* Johnson, 23 S.W.3d at 7. Considering all the evidence in a neutral light, we conclude that the evidence is not too weak to support the finding of guilt beyond a reasonable doubt, nor is the contrary evidence strong enough that the State could not have met its burden of proof. *See* Zuniga, 144 S.W.3d at 484-85. We resolve appellant's fourth issue against him.

2. Intent to Damage or Destroy the Building

In issues five and six, appellant contends the evidence is insufficient to prove that he had the intent to damage or destroy the building. He contends that section 28.02(a)(2)'s requirement of specific intent to damage or destroy a building, *see, e.g.*, Beltran v. State, 593 S.W.2d 688, 689 (Tex. Crim. App. 1980), precludes a conviction for arson based upon an accident. Moreover, appellant contends that the only evidence **[*14]** as to intent was (1) Becker's testimony that he and appellant did not intend to damage or destroy the building, and (2) Adair's opinion that the destruction of the building was an accident.

In his eighth issue, appellant contends that the trial court erred in instructing the jury on transferred intent, thus allowing the jury to find him guilty without proof that he had the specific intent to damage or destroy the building as alleged in the indictment and required by the arson statute. He argues that the evidence did not support the allegation that he had the specific intent to damage or destroy the building and there can be no "transferred intent" when the arson statute requires the "specific intent" to destroy or damage a building. Because appellant's arguments under these three issues overlap, although presented in terms of sufficiency and charge error, we consider them together.

A. Applicable Law

As explained in Loredo v. State, 130 S.W.3d 275, 282 (Tex. App.-Houston [14th Dist.] 2004, pet. ref'd), ***HN7***[⬆] although section 6.04(b) is titled transferred *intent*,

> it is somewhat of a misnomer because the concept does not address intent or any other **[*15]** *mens rea*. Rather, it depicts an effort by the legislature to criminalize an act that resulted in a different offense than the accused intended to commit. *See* Castillo v. State, 71 S.W.3d 812, 815 (Tex. App.-Amarillo 2002, pet. ref'd). Section 6.04(b) transfers the mens rea of a contemplated, but incomplete, offense to the offense actually committed by mistake or accident. Price v. State, 861 S.W.2d 913, 916 (Tex. Crim. App. 1993). The rationale is that public policy demands that persons engaged in criminal activity not be exonerated "merely because they accidentally commit a different offense than originally contemplated." Sargent v. State, 518 S.W.2d 807, 810 (Tex. Crim. App. 1975). Therefore, the intent to commit the contemplated offense transfers to the offense in fact

committed. *Ex parte Easter, 615 S.W.2d 719, 720 (Tex. Crim. App. 1981)*; *Honea v. State, 585 S.W.2d 681, 685 (Tex. Crim. App. 1979)*.

HN8[⬆] The principle of transferred intent under *section 6.04(b)(1)* may be applied in the jury charge when the evidence warrants, although not alleged in the indictment. *See Garcia v. State, 791 S.W.2d 279, 282* ***[*16]*** *(Tex. App.-Corpus Christi 1990, pet. ref'd)* (discussing application of *section 6.04(b)(2)* in murder case).

B. Discussion

Here, there was evidence that appellant entered the building housing Potter Concrete with the intent to burglarize the safe. Appellant used the torch to attempt to open the safe, igniting the papers in the safe. The fire spread to the rest of the building, destroying it. Thus, while appellant entered the building with the intent to commit one offense, burglary, he committed another offense, arson. ***HN9***[⬆] "The intent to commit the contemplated offense transfers to the offense in fact committed." *Loredo, 130 S.W.3d at 282*. The only difference between what appellant intended and what occurred was that a different offense was committed. *See id.*

Appellant argues that "transferred intent" conflicts with arson's "specific intent" requirement. He contends that because the offense of arson explicitly requires the specific intent to damage or destroy a building, there can be no transferred intent in an arson case. However, ***HN10***[⬆] because *section 6.04* does not state an intent requirement, it cannot "conflict" with the intent requirement of the arson statute. **[*17]** The pertinent question is whether appellant intended to commit the "contemplated offense," burglary, but committed a different offense by mistake or accident, arson, and there is evidence that he did. *See id.* Accordingly, the trial court did not err in instructing the jury on transferred intent. *See Garcia, 791 S.W.2d at 282*. We resolve appellant's eighth issue against him.

Turning to appellant's sufficiency issues, we note that the jury charge authorized conviction of appellant for arson if the jury found from the evidence beyond a reasonable doubt that appellant, "intending to cut into a safe with a cutting torch, caused a fire which damaged or destroyed a building . . . ." Under this theory of transferred intent, whether appellant had the specific intent to damage or destroy the building is not at issue. As noted above, the evidence is undisputed that appellant intended to cut into a safe with a cutting torch and caused a fire which damaged or destroyed the building housing Potter Concrete. The evidence that appellant accidentally caused a fire is relevant to this theory and supports appellant's conviction under this theory. Applying the appropriate standards **[*18]** of review, we conclude that the evidence is legally and factually sufficient to support appellant's conviction for arson under this transferred intent theory. Therefore, we need not consider whether the evidence is sufficient to support appellant's conviction under the alternative paragraph which tracks the arson statute.

See Rabbani, 847 S.W.2d at 558-59. We resolve appellant's fifth and sixth issues against him.

IV. EVIDENTIARY RULINGS

In his seventh issue, appellant contends that the trial court abused its discretion in admitting extraneous offense evidence, specifically, evidence regarding a traffic ticket issued in Arlington, Texas, on September 20, 2002 for failure to wear a seat belt and the Florida and Midland burglaries. Citing rules of evidence 403 and 404(b), appellant contends that this evidence was inadmissible because it did not tend to connect him with the indicted offense. In addition, appellant argues that the extraneous offenses were not proved beyond a reasonable doubt.

A. Standard of Review

HN11[⬆] The admission of evidence is a matter within the discretion of the trial court. *Montgomery v. State, 810 S.W.2d 372, 378 (Tex. Crim. App. 1990).* **[*19]** As long as the trial court's ruling was within the "zone of reasonable disagreement" there is no abuse of discretion, and we must uphold the trial court's ruling. *Id. at 391* (op. on reh'g).

B. Discussion

1. Arlington ticket

The record shows that police officer Becki Brandenburg testified regarding the traffic ticket without any objection. Accordingly, appellant failed to preserve any complaint on appeal as to the admissibility of this evidence. *See* ***HN12***[⬆] TEX. R. APP. P. 33.1 (to preserve error, appellant must present to trial court timely request, motion, or objection, state specific grounds, and obtain ruling). Accordingly, we do not consider this evidence further.

2. Florida and Midland burglaries

The record shows that appellant's counsel asked Becker, on cross examination, who worked with him in committing burglaries in Florida. Becker included appellant in his response. When the State attempted to elicit testimony on redirect regarding appellant's involvement with Becker in Florida, appellant's counsel approached the bench, and a hearing was held outside the presence of the jury. The State argued that appellant opened **[*20]** the door, and, pursuant to rule of evidence 404(b), the evidence was relevant to "method, plan, and operation." The State also said that it needed to "corroborate that," referring to Becker's testimony, "because accomplice testimony is not enough." Appellant's counsel requested a limiting instruction and filed one with the trial court. However, appellant's limiting instruction leaves blank a space for the "purpose for which extraneous matters were admitted." There was discussion of the wording of the instruction. As to the Midland burglaries, appellant objected under rules 401, 402, 403, and 404(b). The judge said he would

give a limiting instruction "regarding intent, preparation, plan, and knowledge."

Before the jury, Becker testified that he was in Florida on a family vacation, and appellant flew to Florida the first week of June, 2002, rented a minivan, and stayed in a motel. Becker described how they burglarized the safes of a gas station, a souvenir shop, a liquor store, and a currency exchange. The State introduced a motel receipt showing appellant rented a room from June 4 through 8, 2002, in Kissimmee, Florida, and a van rental agreement from Orlando, Florida, from June 4 **[*21]** through 8, 2002. The jury also heard testimony from two Orange County, Florida law enforcement officers who investigated the June 6 burglary of the liquor store and from the owner of the liquor store.

Becker also testified that he and appellant drove from Dallas to Midland in October 2002, and burglarized a convenience store there. He testified that they successfully used an acetylene torch to cut the bolts holding the safe to the floor. The State introduced car rental records showing appellant rented a van in Dallas on October 14 and returned it on October 24, 2002. The State also introduced a motel receipt showing appellant stayed in Midland from October 14 through October 16, 2002. Midland law enforcement officers testified that they investigated an October 17 convenience store burglary, and that there were burn marks on the floor.

The trial court instructed the jury that if there was any testimony regarding appellant having committed offenses other than the offense alleged in the indictment,

> you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that [appellant] committed such other offenses, if any were committed, **[*22]** and even then, you may only consider the same in determining the intent, plan, preparation, or knowledge of [appellant], if any, in connection with the offense, if any, alleged against him in the indictment in this case and for no other purpose.

Appellant objected to the limiting instruction as given and requested the court give appellant's instruction. The trial court overruled appellant's instruction "to the extent that mine differs at all from yours."

On appeal, appellant argues that the evidence is inadmissible pursuant to rules 404(b) and 403 because this evidence fails to connect him to the indicted offense. Although he argues on appeal that these offenses "were not relevant nor pertinent to any issue in this case," he agreed to a limiting instruction pursuant to rule 404(b) as to "intent, plan, preparation, or knowledge" which he does not challenge on appeal.

Instead, appellant relies on authorities applying *article 38.14* relating to the corroboration of accomplice testimony. *See, e.g., Walker v. State, 615 S.W.2d 728, 731 (Tex. Crim. App. [Panel Op.] 1981)* ("And evidence corroborating what the accomplice witness said he and others did and not **[*23]** tending to connect the appellant with the crime charged cannot be

considered."). However, ***HN13***[⬆] the corroboration requirement of *article 38.14* is not a rule of admissibility of evidence. *See Murdock v. State, 840 S.W.2d 558, 566 (Tex. App.-Texarkana 1992), vacated for remand & reconsideration on other grounds, 845 S.W.2d 915 (Tex. Crim. App. 1993), adopted & incorporated on remand, 856 S.W.2d 262, 264 (Tex. App.-Texarkana 1993, pet. ref'd)*. In addition, extraneous offense evidence is admissible under rule 404(b) for the purpose of corroboration under *article 38.14*. *Lawton v. State, 913 S.W.2d 542, 564 n.9 (Tex. Crim. App. 1995), disavowed on other grounds by Mosley v. State, 983 S.W.2d 249, 263 n.18 (Tex. Crim. App. 1998)*. Accordingly, we reject appellant's argument that evidence of extraneous offenses is inadmissible pursuant to rule 404(b).

Likewise, appellant's argument pursuant to rule of evidence 403 consists of statements that this evidence does not tend to connect appellant with the indicted offense and citations to cases applying *article 38.14*. However, like rule 404(b), we conclude that this complaint **[*24]** does not relate to the admissibility of this evidence under rule 403. *See Murdock, 840 S.W.2d at 566*. Moreover, although this evidence was argued by appellant to be highly prejudicial, he does not argue specifically how it had an undue tendency to suggest that a decision be made on an improper basis such as an emotional one and was thus unfairly prejudicial. *See* TEX. R. EVID. 403. Although appellant cites factors included in a rule 403 balancing test, he does not apply them to these facts. *See Montgomery, 810 S.W.2d at 389-90* (op. on reh'g).

To the extent that appellant is arguing that Becker's testimony regarding the extraneous offenses was not corroborated, we disagree. Even assuming that the terms of *section 38.14* are applicable to extraneous offenses as well as to primary offenses, *see Bustamante v. State, 653 S.W.2d 846, 849 (Tex. App.-Corpus Christi 1982), pet. dism'd improvidently granted, 702 S.W.2d 193 (Tex. Crim. App. 1985)* (per curiam), [1] as noted above, the State introduced van and hotel rental records which placed appellant at or near the scene of the crimes about the time **[*25]** of their commission, thus tending to connect appellant to the extraneous offenses and corroborating Becker's testimony. *See TEX. CODE CRIM. PROC. ANN. art. 38.14*; *Reed, 744 S.W.2d at 127*; *Walker, 615 S.W.2d at 732*. Appellant's argument that no physical evidence ties him to the extraneous offenses is without merit because appellant's connection to the extraneous offenses need not be proved to a certainty; the corroborating evidence need only "tend to connect" appellant with the extraneous offenses. *See TEX. CODE CRIM. PROC. ANN., art. 38.14*.

Lastly, appellant argues that the extraneous offenses were not proved beyond a reasonable doubt and therefore should **[*26]** not have been considered by the jury. ***HN14***[⬆] Prior to the admissibility

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[1] *See Bustamante, 702 S.W.2d at 194* (Clinton, J., dissenting) (discussing status of issue whether testimony of accomplice witness concerning extraneous offenses committed by accomplice and accused must be corroborated as "unsettled").

of any extraneous offense, the trial court must be satisfied "that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense." *Harrell v. State, 884 S.W.2d 154, 160 (Tex. Crim. App. 1994)*; *see* TEX. R. EVID. 104(b). Even assuming appellant preserved this complaint for review by properly objecting below, we reject appellant's argument because the State's uncontradicted evidence, including Becker's corroborated testimony, shows appellant committed the extraneous offenses.

Having rejected appellant's arguments that the trial court abused its discretion in admitting evidence of extraneous offenses, we resolve his seventh issue against him.

CONCLUSION

Having resolve all of appellant's issues against him, we affirm the trial court's judgment.

DOUGLAS S. LANG

JUSTICE

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